

FT
MEADE

JK 268
.P7
Copy 2

FT MEADE
ASIAN

Constitutional Law in 1919-1920

BY
THOMAS REED POWELL

[REPRINTED FROM THE MICHIGAN LAW REVIEW, VOL. XIX,
No. 1, 2 and 3.]

Copyright 1921
BY THE MICHIGAN LAW REVIEW ASSOCIATION

ANN ARBOR
THE MICHIGAN LAW REVIEW ASSOCIATION
1921

Copy 2

TRANSFERRED FROM
COPYRIGHT OFFICE
APR 21 1921

FEB 11 1921

JK268

P7

copy 2

CONSTITUTIONAL LAW IN 1919-1920*

A REVIEW OF THE DECISIONS OF THE SUPREME COURT OF
THE UNITED STATES ON CONSTITUTIONAL QUESTIONS
DURING THE OCTOBER TERM, 1919

THIS review aims to include all the decisions on constitutional questions rendered by the Supreme Court of the United States during the October Term of court which began in October, 1919, and ended in June, 1920.¹ The treatment for the most part contents itself

* This is the first of a series of three papers on this topic. The others will appear in succeeding issues.

¹ Similar reviews of decisions from 1914 to 1919 have appeared in the *AMERICAN POLITICAL SCIENCE REVIEW*, XII, 17-49, 427-457, 640-666, XIII, 47-77, 229-250, 607-633, and XIV, 53-73. That journal plans to continue to review each year the more important decisions of the Supreme Court. It also publishes in nearly every issue a review called "Judicial Decisions on Public Law." Recent ones by Robert E. Cushman will be found in volume XI, pp. 545-555, 720-730, volume XII, pp. 95-105, 272-287, 475-488, 685-694, volume XIII, pp. 100-107, 281-292, 451-459, and volume XIV, pp. 303-316, 461-470. In the *Record of Political Events* published as a supplement to each September issue of the *POLITICAL SCIENCE QUARTERLY* is a section called "The Federal Judiciary" which summarizes briefly the important decisions of the Supreme Court during the preceding year. In 35 *POL. SCI. QUART.* 411, is an article called "The Supreme Court and the Constitution, 1919-1920," which reviews the important decisions of the past year. The *QUARTERLY* plans to publish similar articles in each September issue. In the *AMERICAN BAR ASSOCIATION JOURNAL*, volume VI, pp. 22-33, is a "Review of Recent Supreme Court Decisions" by S. S. Gregory, dealing with selected decisions. It is announced that similar reviews will be contained in the succeeding issues. Each issue of the *BULLETIN OF THE NATIONAL TAX ASSOCIATION* contains a department called "Decisions and Rulings" which reviews a large number of decisions on taxation. This is not confined to decisions of the Supreme Court.

with exposition. The footnotes give references to articles and editorial notes in recognized law journals commenting on the cases here reviewed and on the more important constitutional decisions of other courts.² The classification of the cases and the arrangement of topics are not satisfactory, but no alternative seems distinctly superior. A classification on the basis of the clauses of the Constitution under which the cases arise would have decided demerits. Under the Fourteenth Amendment we should have to jumble together complaints against judicial procedure, tax laws, police measures, exercises of eminent domain and other governmental action. It seems preferable to follow established distinctions between various governmental powers and to let them set the plan for the main structure of the classification.

I. MISCELLANEOUS NATIONAL POWERS

The validity and the effect of the Eighteenth Amendment³ was passed upon in two cases. *Hawke v. Smith*⁴ decided that a state

Beginning with volume 33, the HARVARD LAW REVIEW contains a series of articles called "The Progress of the Law", written by professors in the Harvard Law School. Cases on police power and administrative law will be found in Beale, "Municipal Corporations" (XXXIII, 1058); cases on taxation in Beale, "Conflict of Laws" (XXXIII, 1), and Warren, "Wills and Administration" (XXXIII, 556); and cases on the jurisdiction and procedure of courts in Beale, "Conflict of Laws" (XXXIII, 1), and Scott, "Civil Procedure" (XXXIII, 236).

² It is intended to include references to all articles and notes in law journals which deal with any question of public law. References given without introduction are to discussions of the case considered in the text. For reference to articles in other than technical law journals, the issues of the AMERICAN ECONOMIC REVIEW, AMERICAN HISTORICAL REVIEW, and AMERICAN POLITICAL SCIENCE REVIEW should be consulted. Each issue of these reviews contains a list of articles in periodicals, a considerable number of which have to do with matters out of which spring issues of constitutional law.

³ "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

⁴ 253 U. S. —, 40 Sup. Ct. 495 (1920). See also *Hawke v. Smith*, 253 U. S. —, 40 Sup. Ct. 498 (1920), applying the same principle to the Suffrage

constitution cannot authorize a referendum to the electorate from the action of a state legislature in ratifying an amendment to the federal Constitution. The power to ratify was said to have its source in the federal Constitution. The Fifth Article which provides for amendments is a grant of authority by the people to Congress. Congress is restricted to the choice between two methods of ratification. It may send an amendment to state legislatures or to state conventions. When the Constitution uses the term "state legislature" it means the representative law-making body and not the general electorate. What the term meant when the Constitution was adopted, it means still. The argument that the Constitution looks to ratification by legislative action in the states is unsound. "Ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment." Legislatures get their authority to ratify, not from the people of the state, but through the grant to Congress by the people of the United States. A case⁵ which allowed a state with the assent of Congress to apply the referendum to an act of the state legislature fixing the boundaries of congressional districts was said to be inapposite, since such action is legislative in character while the ratification of an amendment is not. "The choice of means of ratification was wisely withheld from conflicting action in the several states." Otherwise there might be "endless confusion in the manner of ratification of federal amendments." It is apparent that what Mr. Justice Day says about the referendum is applicable to other state attempts to restrict state legislatures in ratifying amendments to the federal Constitution, and that the Tennessee legislature was justified in acting on the Nineteenth Amendment in disregard of the requirement of the Tennessee constitution that an election of members of the legislature must intervene between

Amendment. See 91 CENT. L. J. 1. For discussions of the referendum question prior to the Supreme Court decision, see William Howard Taft, "Can Ratification of an Amendment to the Constitution Be Made to Depend on a Referendum?", 28 YALE L. J. 821, and notes in 8 CALIF. L. REV. 185, 89 CENT. L. J. 334, 19 COLUM. L. REV. 502, 4 CORNELL L. Q. 195, 33 HARV. L. REV. 287, 23 LAW NOTES 62, 102, 119, 24 LAW NOTES 64, 4 MASS. L. Q. 236, 342, and 18 MICH. L. REV. 51, 698. Some of the discussions cited in note 6, *infra*, also consider the referendum question.

⁵ Davis v. Hildebrant, 241 U. S. 565, 36 Sup. Ct. 708 (1916).

the submission of a proposed amendment by Congress and its consideration by the state legislature.

The Eighteenth Amendment as a whole was sustained in *Rhode Island v. Palmer*.⁶ The court introduced a novelty into its practice by contenting itself with a statement of its conclusions and refraining from giving its reasons. This is often done in so-called memorandum opinions, but these have heretofore been confined to questions of minor importance or to issues already well settled. The validity of the Amendment was contested on the ground of alleged defects in the methods of its submission and adoption and on the basis of objections to its substance. *Harwe v. Smith*⁷ was cited for the affirmation of the court that a state cannot apply a referendum

⁶ 253 U. S. —, 40 Sup. Ct. 486 (1920). See 91 CENT. L. J. 1. For discussions of the validity of the Amendment prior to the Supreme Court decisions, see Everett V. Abbott, "Inalienable Rights and the Eighteenth Amendment", 20 COLUM. L. REV. 183, Lucilius A. Emery, "The Eighteenth Amendment to the Constitution of the United States", 13 MAINE L. REV. 121, William L. Frierson, "Amending the Constitution of the United States", 33 HARV. L. REV. 659, Frank W. Grinnell, "Limitations on the Kind of Amendments to the Federal Constitution Provided for by Article V", 5 MASS. L. Q. 116, Fred B. Hart, "The Amendatory Power Under the Constitution, Particularly with Reference to Amendment 18", 90 CENT. L. J. 229, Howard C. Joyce, "The Prohibition Amendment as an Encroachment on the Inherent Rights of the States", 23 LAW NOTES 26, William L. Marbury, "The Limitations Upon the Amending Power", 33 HARV. L. REV. 223, D. O. McGovney, "Is the Eighteenth Amendment Void Because of Its Contents?", 20 COLUM. L. REV. 499, Fred H. Peterson, "Modern Views on Amending the Constitution", 89 CENT. L. J. 188, George D. Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment", 18 MICH. L. REV. 213, Wayne B. Wheeler, "The Constitutionality of the Constitution is Not a Justiciable Question", 90 CENT. L. J. 152, Justin DuPratt White, "Is There an Eighteenth Amendment?", 5 CORNELL L. Q. 113, 23 LAW NOTES 188, George Washington Williams, "What, if Any, Limitations Are There Upon the Power to Amend the Constitution of the United States?", 6 VA. L. REG. *n.s.* 161, and notes in 18 MICH. L. REV. 155, 700. For discussions of the interpretation of the second section of the Amendment see Minor Bronaugh, "Concurrent Jurisdiction", 23 LAW NOTES 85, O. K. Cushing, "'Concurrent Power' in the Eighteenth Amendment", 8 CALIF. L. REV. 205, Wayne B. Wheeler, "Which Definition of 'Concurrent Power' Will the Supreme Court Choose?", 90 CENT. L. J. 283. "'Concurrent Jurisdiction' Not the Same as Concurrent Power", 22 LAW NOTES 107, and note in 33 HARV. L. REV. 968.

⁷ Note 4, *supra*.

to the rejection or ratification of an amendment. An earlier case⁸ on the vote necessary to pass a bill over the President's veto was adduced for the decision that an amendment may be proposed by a vote of two-thirds of the members present in each house, provided there is a quorum. It is not necessary to have "a vote of two-thirds of the entire membership, present and absent." The proposal by the requisite vote "sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential." The objections urged against the substance of the amendment were that it was an "addition" and not an "amendment" because not germane to anything in the original Constitution, that it was legislation and hence improper for inclusion in the Constitution, and that it interfered with the powers reserved to the States by the Tenth Amendment and was a step towards the destruction of the federal system ordained by the Constitution and therefore not within the amending power. Without specifying these objections, the court through Mr. Justice Van Devanter states succinctly that the prohibition provision of the Amendment is within the amending power, is now a part of the Constitution and "must be respected and given effect the same as other provisions of that instrument," is "operative throughout the entire territorial limits of the United States" and "of its own force invalidates every legislative Act, whether by Congress, by a state Legislature, or by a territorial assembly, which authorizes or sanctions what the section forbids."

The decision on the validity of the Amendment was unanimous. Mr. Justice McReynolds concurred in the disposition of the cases, but declined to express himself on the effect of the amendment on the power of the states. Mr. Justice McKenna went further and disagreed with the interpretation of the Amendment announced by the majority. This interpretation was put by Mr. Justice Van Devanter as follows :

"The second section of the amendment—the one declaring 'The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation'—does

⁸ Missouri Pacific Ry. v. Kansas, 248 U. S. 279, 39 Sup. Ct. 93 (1919).

not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate legislation.

“The words ‘concurrent power’, in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intra-state affairs.

“The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.”

The Chief Justice, in a separate concurring opinion confined to the interpretation of the Amendment, expressed his profound regret that the court should have been content to state its conclusions without adding its reasons. He in effect construes “concurrent power” to mean “equal and independent power”, and insists that the opposite construction contended for would result in a paramount power of Congress or the states and not a concurrent power, and would also in effect nullify the amendment. In elaboration he adds:

“Comprehensively looking at all these contentions, the confusion and contradiction to which they lead, serve in my judgment to make it certain that it cannot possibly be that Congress and the states entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or, if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated. It is true indeed that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels a consideration of the context in view of the situation and the subject with which the amendment dealt and the pur-

pose which it was intended to accomplish, the confusion will be seen to be only apparent.”

Mr. Justice McKenna’s disagreement was based largely on the normal and natural meaning of the words “concurrent power” which the Chief Justice conceded. He refused to assent to the proposition that the interpretation put upon concurrent power by him would practically nullify the amendment, saying hopefully:

“The conviction of the evils of intemperance—the eager and ardent sentiment that impelled the amendment, will impel its execution through Congress and the States. It may not be in such legislation as the Volstead Act with its $\frac{1}{2}$ of 1 per cent. of alcohol or in such legislation as some of the states have enacted with their 2.75 per cent. of alcohol, but it will be a law that will be prohibitive of intoxicating liquor for beverage purposes. It may require a little time to achieve, it may require some adjustments, but of its ultimate achievement there can be no doubt.”

To this was added the comment that, if difficulties result from enforcing the amendment according to its terms, they are nothing with which the court has to do. The learned dissident declares his belief that the framers of the amendment “meant what they said and that they must be taken at their word.” The word “concurrent”, he insists, has the “inexorable requirement of coincident or united action, not alternative or emergent action to safeguard against the delinquency of Congress or the states.” His analysis of the situation resulting from the amendment is as follows:

“If it be said that the states get no power over prohibition that they did not have before, it cannot be said that it was not preserved to them by the amendment, notwithstanding the policy of prohibition was made national, and besides, there was a gift of a power to Congress that it did not have before, a gift of a right to be exercised within state lines, but with the limitation or condition that the powers of the states should remain with the states and be participated in by Congress only in concurrence with the states, and thereby preserved from abuse by either, or exercise to the detriment of prohibi-

tion. There was, however, a power given to the states, a power over importations. This power was subject to concurrence with Congress and had the same safeguards.”

The remaining question in the case was whether the power to enforce the prohibition of the first section of the Amendment justified Congress in putting the ban on liquor containing as little as one-half of one per cent. of alcohol by volume. The argument against this low limit was that, since the first section prohibited only intoxicating liquors, the enforcing legislation must permit the sale and manufacture of non-intoxicating liquors. Otherwise the restrictive word “intoxicating” in the first section would be nugatory. The case sustaining the one-half of one per cent. limit in the War Prohibition Act was sought to be distinguished on the ground that the war power is general and undefined, while the power under the Amendment is confined to enforcing the prohibition against liquor in fact intoxicating. But the court, without stating or discussing these specific contentions, adduced the *War Prohibition Cases*⁹ for the conclusion that, “while recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act”.¹⁰

The War Prohibition Act of 1918, passed ten days after the armistice, came before the court in *Hamilton v. Kentucky Distilleries & Warehouse Co.*,¹¹ and was unanimously sustained. It was interpreted to apply only to intoxicating liquors. Mr. Justice Brandeis said that “prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency”. He recognized that “the war power of the United States, like its other powers and like the police powers of the states, is subject to applicable constitutional limitations”, but he laid down that “the Fifth Amendment imposes

⁹ *Ruppert v. Caffey*, note 12, *infra*.

¹⁰ For an article on the Nineteenth Amendment, see Emmet O’Neal, “The Susan B. Anthony Amendment. Effect of Its Ratification on the Rights of the States to Regulate and Control Suffrage and Elections”, 89 CENT. L. J. 169, 6 VA. L. REV. 338.

¹¹ 251 U. S. 146, 40 Sup. Ct. 106 (1919). See 33 HARV. L. REV. 585, 608, 18 MICH. L. REV. 706, and 29 YALE L. J. 437, 440. For discussions prior to the decision, see 8 CALIF. L. REV. 44, 18 MICH. L. REV. 159, and 29 YALE L. J. 113.

in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power". The question whether the immediate and absolute destruction of the value of intoxicating liquors could be caused without compensation was dismissed from consideration by pointing out that the Act gave seven months and nine days in which to dispose of liquors on hand. This was held to be a reasonable period. The fact that liquor is not readily marketable until reasonably aged was called merely an inconvenience to the owner attributable to the inherent character of the property, which inconvenience is not a taking of property in the constitutional sense. On the question whether the Act had become void by the passing of the war emergency, the court confined itself to declaring that it was not convinced that the emergency had passed when the suits in question were begun. The discussion on this point recognizes that change of circumstances may operate to render constitutionally unenforceable a statute concededly valid when passed, and assumes for the purpose of the case that the principle is applicable to exercises of the war power. But, in view of the holding that the Act had not yet expired by its terms and of the facts that the treaty of peace had not yet been concluded, that the railroads were still under national control by virtue of the war powers, and other facts of public knowledge, the court found itself unable to conclude that the Act had ceased to be valid. The contention that the Eighteenth Amendment impliedly guaranteed immunity from prohibition until one year after its ratification was dismissed by pointing out that it would, if sound, emasculate the war power even if hostilities were at their height and would also release the grasp of state prohibition.

The war power was extended still further in *Ruppert v. Caffey*,¹² which by a vote of five to four sustained the Volstead Act of October 28, 1919, with its suppression of the manufacture and sale of liquor conceded by motion to dismiss to be non-intoxicating. Mr. Justice McReynolds, for the minority, declared that it was notorious that the war emergency had passed when the statute was enacted, at least so

¹² 251 U. S. 264, 40 Sup. Ct. 141 (1920). See 33 HARV. L. REV. 585, 608, 24 LAW NOTES 25, and 5 VA. L. REG. n. s. 874. Justices Day, Van Devanter, McReynolds and Clark dissented.

far as any justification for the suppression of non-intoxicating liquor is concerned. He implied that the statute thus enforced violated both the Fifth and Tenth Amendments. Calling the suppression of non-intoxicants the exercise of a power implied from an implied power, he queried: "If all this be true, why may not the second implied power engender a third under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc.?" He insisted that there is a distinction between the control which the states may exercise over non-intoxicants by virtue of their inherent power and that which may be wielded by Congress under authority inferred from the war power. For the majority, Mr. Justice Brandeis answered that the argument that one implied power may not be grafted on another implied power is a mere matter of words. The "war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale." All the powers of Congress are express powers. The proper distinction is between "specific" and "general" powers. Thus the war power over intoxicating liquors is as full and complete as the police powers of the states, and the principle that the state may prohibit near beer as a means of suppressing the genuine article applies also to the war power of Congress. On the question of the absence of compensation for the loss occasioned by the fact that the Volstead Act was in effect from the moment of its enactment, Mr. Justice Brandeis said only that "here as in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use."

The constitutionality of the Selective Service Law and the Espionage Act was reaffirmed in *O'Connell v. United States*¹³ on the authority of cases decided after the writ of error in the *O'Connell* case was sued out. The opinion was confined to questions of interpretation and of federal practice. A conspiracy to obstruct recruiting and enlistment by persuasion was held to be a crime within the latter Act, and the former was found to cover false statements as to fitness or liability for service as well when made by private persons

¹³ 253 U. S. —, 40 Sup. Co. 444 (1920).

as by officers charged with the enforcement of the law. In three important cases¹⁴ sustaining convictions under the Espionage Act or its amendment of May 16, 1918, there was a difference of opinion as to the scope and application of the First Amendment guaranteeing freedom of speech and of the press. It was not denied that the statute was constitutional if properly restricted. These cases will be considered in a later section dealing with immunities of persons charged with crime.¹⁵

The treaty-making power and the power of Congress to enforce treaties by legislation was questioned in *Missouri v. Holland*.¹⁶ Great Britain and the United States had made a treaty providing for closed seasons and other protection for migratory birds and engaging to enact legislation to carry the treaty into effect. Congress thereafter passed the Migratory Bird Treaty Act. Missouri brought a bill to enjoin the federal game warden from enforcing the act and the authorized regulations of the Secretary of Agriculture, claiming that such enforcement encroached on the powers reserved to it by the Tenth Amendment. Mr. Justice Holmes, for an unanimous court, laid down that the only question was the validity of the treaty. "If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." The discussion of the specific issue before the court is prefaced by the statement:

¹⁴ *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17 (1919), *Pierce v. United States*, 253 U. S. 239, 40 Sup. Ct. 205 (1920), *Schaefer v. United States*, 251 U. S. 466, 40 Sup. Ct. 259 (1920).

¹⁵ For notes on *Northern Pacific Ry Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502 (1919), and *Dakota Central Telephone Co v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507 (1919), holding that federal control of railroads under the war power precludes the operation of state rate regulations, see 19 *COL. L. REV.* 489, 33 *HARV. L. REV.* 94, 115, and 68 *U. PA. L. REV.* 68. See also Henry Upson Sims, "The Power of the Federal Government to Extend the Recent War Acts of Congress Into Times of Peace", 5 *VA. L. REV.* 87. For incidents of federal control of the railroads, see 20 *COLUM. L. REV.* 352, 501. For injunctions under Lever Act against the coal strike, see 5 *CORNELL L. Q.* 184.

¹⁶ 252 U. S. 416, 40 Sup. Ct. 382 (1920). See 20 *COLUM. L. REV.* 692 and 6 *VA. L. REG. n. s.* 214. For discussions prior to the decision see 8 *CALIF. L. REV.* 177, 33 *HARV. L. REV.* 281, 312, 23 *LAW NOTES* 148, 68 *U. PA. L. REV.* 160, and 29 *YALE L. J.* 445.

“Acts of Congress are made the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.”

What this different way is is not definitely set forth, but the treaty in question was found to involve “a national interest of very nearly the first magnitude.” The inference is that the test of the validity of a treaty is an adequate national interest in the subject matter with which it deals. The fact that the states are individually incompetent to deal with the subject matter seems to be regarded as important. “It is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.” Then follows a plea for a progressive recognition of new national needs:

“When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.”

The opinion makes clear that a treaty on any subject of national interest has nothing to fear from any reserved powers of the states.

Its hint that there may be no other test to be applied than whether the treaty has been duly concluded indicates that the court might hold that specific constitutional limitations in favor of individual liberty and property are not applicable to deprivations wrought by treaties. It would be going a step further to extend the same immunity to legislation enforcing treaties. It is of course not safe to take expressions in a judicial opinion as the considered judgment of all the members of the court. Missouri's contention in the principal case received the approval of Justices Pitney and Van Devanter who dissented, but without giving their reasons.¹⁷

In the endeavor to allow state workmen's compensation laws to apply to injuries within the admiralty and maritime jurisdiction vested in the federal courts, Congress in 1917 added to the admiralty provision of the Judicial Code a clause saving "to claimants their rights and remedies under the workmen's compensation laws of any state." This provision a majority of the Supreme Court declared unconstitutional in *Knickerbocker Ice Co. v. Stewart*.¹⁸ The basis of the decision seems to be a belief that the Constitution somehow adopted and established the approved rules of general maritime law and that such power as Congress has under the necessary and proper

¹⁷ See a note in 29 YALE L. J. 114 on the effect of a treaty on a state tax law. Articles on the League of Nations and the Constitution will be found in 89 CENT. L. J. 21, 70, 79, 93, 113, 226, 244, and 370. See also Edward S. Corwin, "The Power of Congress to Declare Peace", 18 MICH. L. REV. 669, John M. Matthews, "The League of Nations and the Constitution", 18 MICH. L. REV. 378, Albert H. Washburn, "Treaty Amendments and Reservations", 5 CORNELL L. Q. 247, and Quincy Wright, "Treaties and the Constitutional Separation of Powers in the United States", 12 AM. J. INT. LAW 64, "The Legal Nature of Treaties", 13 AM. J. INT. LAW 706, "The Constitutionality of Treaties", 13 AM. J. INT. LAW 242, "Conflicts of International Law with National Laws and Ordinances", 11 AM. J. INT. LAW 1, "Amendments and Reservations to the Treaty", 4 MINN. L. REV. 14, and "Validity of the Proposed Reservations to the Treaty", 20 COLUM. L. REV. 121.

¹⁸ 253 U. S. —, 40 Sup. Ct. 438 (1920). The majority opinion is by Mr. Justice McReynolds. The dissenting Justices are Holmes, Pitney, Brandeis and Clarke. See 8 CALIF. L. REV. 339, 20 COLUM. L. REV. 685, 18 MICH. L. REV. 793, and 29 YALE L. J. 925. For discussions prior to the decision see 8 CALIF. L. REV. 169, 5 CORNELL L. Q. 275, and 4 MINN. L. REV. 444. A few months before the *Knickerbocker* case, the Supreme Court had held that the amendment in question is not retroactive. *Peters v. Vesey*, 251 U. S. 121, 40 Sup. Ct. 65 (1919). See 29 YALE L. J. 363.

clause to add to or change the maritime law is limited to the attainment of the object of relieving "maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation" and the establishment "so far as practicable" of "harmonious and uniform rules applicable throughout every part of the United States." Instead of doing this Congress was thought to have attempted to delegate its powers to the states, which under recognized principles it cannot do. For the minority Mr. Justice Holmes insisted that, since the state compensation law in question was in force when Congress passed the act of 1917, it should be regarded as having been adopted by Congress as part of the federal maritime law. He was further of opinion that it would not be a delegation of power to the states if Congress adopted in advance their future compensation laws, just as Congress has provided that the practice in the federal courts shall conform as near as may be to the practice in the state courts; but he thought it not necessary to go so far in order to allow the application of the law before the court. He denied that the Constitution itself adopted any maritime law by extending the federal judicial power to cases of admiralty and maritime jurisdiction, and he found no implication in the Constitution that such maritime law as Congress may establish must be uniform throughout the United States. It would be extravagant, he declared, to read into the silence of the Constitution "a requirement of uniformity more mechanical than is educed from the express requirement of equality in the Fourteenth Amendment."¹⁹

The power of Congress to attach conditions to the appropriation of money to pay private claims raised a sharp difference of opinion in *Calhoun v. Massie*.²⁰ The court had previously sustained a clause in the statute providing that not more than twenty per cent. of the

¹⁹ For a note on *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 38 Sup. Ct. 501 (1918), holding the common-law rules of liability inapplicable to an injury within the admiralty jurisdiction, see 33 HARV. L. REV. 300, 309. For a note on *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 Sup. Ct. 112 (1919), holding a state statute of frauds inapplicable to a maritime contract, see 8 CALIF. L. REV. 114.

²⁰ 253 U. S. —, 40 Sup. Ct. 474 (1920). Justices McKenna, Van Devanter, Pitney and McReynolds dissent. The same statute was declared to be valid in *Newman v. Moyers*, 252 U. S. —, 40 Sup. Ct. 478 (1920).

money paid by the government should be paid to or received by any attorney on account of services rendered in connection with the claim. In that case²¹ Mr. Justice McKenna had said that if the judgment of the attorney against his client sought to reach only assets other than those received from the Government, "the limitation in the act appropriating the money to 20 per cent. as the amount to be paid to an agent or attorney would have no application or be involved." In the principal case, Calhoun who had received from the Government twenty per cent. of the amount awarded to his client Massie, sued in a state court to get an additional thirty per cent. under a contract made before the passage of the appropriation bill containing the limitation previously referred to and also this additional one :

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty percentum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding."

Massie insisted that this clause protected him from paying from any source more than twenty per cent. of what he received from the government, and a majority of the Supreme Court agreed with him. Mr. Justice Brandeis found the clause in question so clear as to leave "no room for construction." Mr. Justice McReynolds, for the minority, without quoting or discussing the paragraph in question, rebuked his colleague for not quoting or discussing the previous dictum of Mr. Justice McKenna by saying that "the result is necessarily injurious both to the court and to the public." It is doubtful whether this dictum was intended, as Mr. Justice McReynolds assumes, to apply to the paragraph of the statute adduced by Mr. Massie. If it did, it is pretty obviously erroneous. The dissent is not confined to the question of construction, though Mr. Justice McReynolds says nothing more specific on the constitutional issue than to remind us that "the Fifth Amendment was intended to protect the individual against arbitrary exercise of federal power" and that its

²¹ Capital Trust Co. v. Calhoun, 250 U. S. 208, 39 Sup. Ct. 486 (1919).

“inhibition protects every man in his right to engage in honest and useful work for compensation.” His earlier mention of the fact that the contract in question was made prior to the statute regulating the fee to be charged leaves it doubtful whether his dissent would apply to such a regulation that is wholly prospective. He rests his objections wholly on grounds of due process, without touching on the possible point that the regulation of private contracts goes beyond the field of federal power and poaches on the reserved preserves of the states. For the majority, Mr. Justice Brandeis posits the constitutionality of the statute on the fact that the appropriation to pay the claim is a condition precedent to liability on the part of the client to the attorney. Calhoun’s chance to get anything is dependent on congressional grace or favor. Therefore the favor may be extended on terms. He has no constitutional right to bite the hand which feeds him. Since he undertook to get his client’s claim approved by the government, his assent to the terms under which the approval was given may be implied. He is also estopped from repudiating the statute after he has received his authorized twenty per cent. under it. Of these “special reasons”, Mr. Justice McReynolds says that one “can only serve to mislead” and the other “lacks substance and can serve no good purpose”. Both, he insists, assume the construction and the constitutionality of the statute. Cases cited in the majority opinion “as authority for such oppressive legislation” are said to “give it no support,” and it is pointed out wherein the statutes therein sustained stop short of the one before the court. Mr. Justice McReynolds takes much more pains to prove Mr. Justice Brandeis wrong than to prove himself right. His peppery opinion gives interesting evidence of the human factors that enter into the solution of constitutional issues.

In *Ervien v. United States*²² the answer to an interesting constitutional question is assumed without discussion or citation of authority. The Enabling Act under which New Mexico was admitted to the Union granted the new state certain public lands on specified trusts. The state later proposed to spend three per cent. of the proceeds from the sale of the lands in advertising the advantages of the state as a place to live in. The District Court thought this a wise

²² 251 U. S. 41, 40 Sup. Ct. 75 (1919).

administration of the trust as it tended to enhance the price of the lands. This, the Supreme Court did not deny, but it held nevertheless that the United States as grantor might, as it did, reserve control over the matter and exact the performance of the conditions on which the lands were given and held. This case, like the preceding one, illustrates the power of the United States to keep a string attached to its grants and to continue to pull the string even though all but the string has passed from its control. In this respect the case differs from stipulations in enabling acts which seek to continue control over the public, governmental powers of states admitted thereunder.²³

The other cases on national power are of minor importance, with the exception of those involving questions of taxation and of commerce which will be treated in succeeding sections. National control over the Indians, was sustained in two decisions. *United States v. Board of Commissioners*²⁴ sanctioned the authority of the United States, as guardian of the Indians to bring a suit in the federal courts to protect lands owned by non-competent Indians from illegal state taxes. The fact that the lands were taxable by the state after proper assessment was held insufficient to deprive the United States of its duty and right to ensure that its wards are not illegally deprived of the property rights previously conferred upon them. This same benevolent guardianship of the Indians arose also in *Nadeau v. Union Pacific R. Co.*,²⁵ which affirmed a grant to a railroad in 1862 of a four hundred foot strip of land through an Indian reservation. The tract was said to be "part of the domain held by the tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States." On the authority of earlier decisions it was declared that "the power of the United States, as guardian for the Indians, to legislate in respect to such lands is settled." Patents issued subsequent to the grant to the railroad, without expressly reserving a right of way to the road, were held to give no rights to the strip in question. Any claim based on occupancy or possession was

²³ See *Coyle v. Smith*, 221 U. S. 559, 31 Sup. Ct. 688 (1911). For an article bearing on the general question involved in the *Ervien* case, see Andrew A. Bruce, "State Socialism and the School Land Grants", 33 HARV. L. REV. 401.

²⁴ 251 U. S. 128, 40 Sup. Ct. 100 (1919).

²⁵ 253 U. S. —, 40 Sup. Ct. 570 (1920).

said to be precluded by earlier decisions. Mr. Justice Clarke dissented, and Justices Holmes, Pitney and Brandeis did not sit.

While it is not clear that any constitutional issue was directly involved in *Burnap v. United States*,²⁶ Mr. Justice Brandeis in the course of the opinion pointed out that Congress might invest the appointment of inferior officers either in the President alone, in the courts of law, or in the heads of departments. The power to remove was declared to be, "in the absence of statutory provision to the contrary, an incident of the power to appoint." The term "head of a department", as used in the statute, was said to mean "the Secretary in charge of a great division of the executive branch of the government, like the State, Treasury, and War, who is a member of the Cabinet", and not to "include heads of bureaus of lesser divisions."²⁷

Another case involving the application of an uncontested constitutional principle is *Evans v. National Bank of Savannah*.²⁸ It was agreed that the powers of a national bank in respect to discounts and the rate to be charged is subject to the control of Congress and not of the states. But Congress had prescribed that the rate to be charged should be that "allowed by the laws of the state or territory where the bank is located, and no more." The application of this provision to the case at bar depended upon a combination of elementary mathematics and advanced jurisprudence. The Georgia statute forbade a rate of interest in excess of eight per cent. "either directly or indirectly by way of commission for advances." The Georgia supreme court held that eight per cent. discount charged in advance was more than eight per cent. interest. Mr. Justice Pitney for himself and Justices Brandeis and Clarke agreed. He insisted that "the laws of the state" as used by Congress meant not merely the words of particular sections of state statutes, but "all applicable provisions of the statutes as interpreted and construed by the decisions of the court of last resort" of the state. Mr. Justice McReynolds, for the majority, did not specifically controvert these positions, but he relied on the rule of the federal courts that it is not usurious

²⁶ 252 U. S. 512, 40 Sup. Ct. 374 (1920).

²⁷ For a discussion of the President's power of removal, see Thomas Reed Powell, "The President's Veto of the Budget Bill", 9 NAT. MUN. REV. 538.

²⁸ 251 U. S. 108, 40 Sup. Ct. 58 (1919). See 33 HARV. L. REV. 725, 18 MICH. L. REV. 345, and 29 YALE L. J. 457.

to collect the highest rate of legal interest at the time the loan is made, and insisted that the power given to national banks to discount notes includes "the power, which banks generally exercise, of discounting notes reserving charges at the highest rate permitted for interest." He looked to the state law only for the rate, and to the national law for the definition of usury.²⁹

II. REGULATION OF COMMERCE

I. *Power of Congress*

The extensive power of Congress over foreign commerce finds illustration in *Strathearn S. S. Co. v. Dillon*.³⁰ This sustained a provision in the Seamen's Act which, as interpreted, entitles any seaman shipping in foreign ports on foreign ships to disregard contracts postponing payment of wages until the end of the voyage and to demand at any American port one-half the wages earned to date. If the demand is not complied with, the seaman may sue in a federal district court for the entire wages then earned. Most of the opinion of Mr. Justice Day deals with the question of interpretation. The shipping company, backed by the British Embassy, urged that the Act should be limited to American seamen; but the court adduced against them the plain language of the statute and the further consideration that such "construction would have a tendency to prevent the employment of American seamen, and to promote the engage-

²⁹ For a note on the power of a national bank to manage a railroad, see 33 HARV. L. REV. 718, 726. See also Randall J. LeBoeuf, "National Banks as Fiduciaries in New York", 5 CORNELL L. Q. 128, and Walter Wyatt, "Fiduciary Powers of National Banks", 6 VA. L. REV. 301.

For a discussion of the national postal power, see Robert E. Cushman, "National Police Power Under the Postal Clause of the Constitution", 4 MINN L. REV. 402.

Consideration of the power of the national government over aliens will be found in Howard L. Bevis, "The Deportation of Aliens", 68 U. PA. L. REV. 97, and notes in 20 COLUM. L. REV. 680, 18 MICH. L. REV. 422, 6 VA. L. REV. 201, and 29 YALE L. J. 561. The right of aliens to take real property is discussed in 5 CORNELL L. Q. 209.

³⁰ 253 U. S. 348, 40 Sup. Ct. 350 (1920). The case is followed in *Thompson v. Lucas* (The Westmeath), 253 U. S. 358, 40 Sup. Ct. 353 (1920). See 20 COLUM. L. REV. 479, and for comment prior to the decision, 20 COLUM. L. REV. 207.

ment of those who were not entitled to sue for one-half wages under the provisions of the law” and thus defeat the purpose of Congress in passing it. The constitutional issue involved was declared to have been settled by an earlier case³¹ in which the conclusion was “reached that the jurisdiction of this government over foreign merchant vessels in our ports was such as to give authority to Congress to make provisions of the character now under consideration; that it was for this government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the shipment of sailors in our own ports and make them applicable to foreign as well as domestic vessels.” From this it seems that ships which wish to enter our ports must behave according to our taste on the high seas and in their home ports.

*Board of Public Utility Commissioners v. Ynchausti & Co.*³² found no denial of due process of law in an order of the Philippine Board of Public Utility Commissioners requiring the free carriage of mails as a condition of granting to vessels a permit to engage in the coastwise trade. The case was said to depend entirely upon the power to limit the coastwise trade. This was found to be plenary. Hence it was assumed to follow inevitably that no condition attached to a grant could deny due process of law. There is a hint in the opinion of the Chief Justice that the doctrine of the case is limited to legislation for “territory not forming part of the United States because not incorporated therein” under the principles of the *Insular Cases*; but the hint is back-handed and, in view of the frequent declarations of the complete power of Congress over foreign commerce, it must be doubted whether any distinction would be made in favor of ships engaged in that commerce. Yet plainly the opinion leaves room for a different attitude towards a congressional regulation of the interstate coasting trade. The order was questioned under the due-process clause of the Philippine Bill of Rights, which, it was recognized, was intended by Congress to have in the Philippines the settled construction that similar clauses receive in the United States. Yet it was added that the “result of their application must depend upon the

³¹ *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821 (1903).

³² 251 U. S. 401, 40 Sup. Ct. 277 (1920).

nature and character of the powers conferred by Congress upon the government of the Islands."

The so-called Reed Amendment which had been sustained in an earlier case,³³ came before the court again in *United States v. Simpson*,³⁴ in which a person who transported five gallons of whiskey in his own automobile sought to escape from the toils of the statute. Mr. Justice Clarke in dissenting insisted that "interstate commerce, in the constitutional sense, is defined to mean commercial, business, intercourse" and especially "the exchange, buying or selling of commodities, of merchandise, on a large scale between the inhabitants of different states." He thought that liquor purchased by a man for his personal use and transported by him in a private vehicle was "withdrawn from trade or commerce as thus defined", and that at the time when the Reed Amendment was enacted Congress had no power to deal with Mr. Simpson on such a frolic of his own. "The grant of power to Congress is over Commerce,—not over isolated movements of small amounts of private property, by private persons for their personal use." The rest of the court contented themselves with asserting, through Mr. Justice Van Devanter, that the introduction of intoxicating liquor across state lines into forbidden territory "could be effected only through transportation, and whether this took one form or another it was transportation in interstate commerce." In refusing to restrict the natural meaning of the words of the statute, Mr. Justice Van Devanter pointed out that the law would not be of much practical benefit if its purpose could be frustrated by transportation in automobiles. Mr. Justice Clarke in his dissent said he thought that the *Hill* case was wrongly decided. Mr. Justice McReynolds who had dissented with him in the *Hill* case concurred in this.

Three prosecutions under the Sherman Anti-trust Law turned wholly on the question whether there had been restraint of trade, it being assumed that the trade involved was interstate commerce.³⁵

³³ *United States v. Hill*, 248 U. S. 420, 39 Sup. Ct. 143 (1919).

³⁴ 252 U. S. 465, 40 Sup. Ct. 364 (1920). See 26 W. VA. L. Q. 73, and 29 YALE L. J. 922. For a general article see Lindsay Rogers, "'Life, Liberty, and Liquor': A Note on the Police Power", 6 VA. L. REV. 156.

³⁵ In *United States v. United States Steel Corporation*, 251 U. S. 417, 40 Sup. Ct. 293 (1920), the acts charged were regarded by four judges as not

Blumenstock Brothers' Advertising Agency v. Curtis Publishing Co.,³⁶ however, turned on a construction of the commerce clause. This was a suit for triple damages under the Sherman Act, based on the refusal of the defendant to accept advertising from the plaintiff unless the plaintiff would accede to the defendant's conditions as to advertising in rival publications. The court held that the complaint did not state a cause of action, since the contracts for advertising were not interstate commerce. Mr. Justice Day's reference to cases on insurance carries the implication that advertising is not commerce, but this is not explicitly stated, and the case is direct authority only on the question whether the contracts or commerce in question were interstate. In answering this in the negative, Mr. Justice Day said that "the advertising contracts did not involve any movement of goods or merchandise in interstate commerce or any transmission of intelligence in such commerce." The circulation of the journals in interstate commerce was thought not to "depend upon or have any direct relation to the advertising contract." The case was said to

within the statute. Justices Day, Pitney, and Clarke dissented, and Justices McReynolds and Brandeis did not sit, so that a minority of the full bench was sufficient to give the defendant a clean bill of health. See 20 COLUM. L. REV. 462, and 33 HARV. L. REV. 964, 986. In *United States v. Reading Co.*, 253 U. S. —, 40 Sup. Ct. 425 (1920), the three judges who dissented in the Steel case joined with Justices McKenna, McReynolds and Brandeis in finding the defendant guilty of an illegal monopoly under the Act. The Chief Justice and Justices Holmes and Van Devanter dissented. In *United States v. A. Schrader's Son*, 252 U. S. 85, 40 Sup. Ct. 251 (1920), the making of agreements by manufacturers with retailers for the purpose of maintaining resale prices were held to be an unlawful restraint of trade. Mr. Justice Clarke confined his concurrence to the result, and Justices Holmes and Brandeis dissented. See 33 HARV. L. REV. 966, 986, 18 MICH. L. REV. 556, and 29 YALE L. J. 696. The Schrader case was distinguished from *United States v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465 (1919), decided the preceding term, on the ground that in the Colgate case there were no definite contracts for resale price maintenance. For notes on the Colgate case see 5 CORNELL L. Q. 100 and 29 YALE L. J. 365. For other notes on cases on unfair competition and restraint of trade see 20 COLUM. L. REV. 328, 5 CORNELL L. Q. 323, 33 HARV. L. REV. 320, 617, 18 MICH. L. REV. 71, and 29 YALE L. J. 125. See also Charles Grove Haines, "Efforts to Define Unfair Competition", 29 YALE L. J. 1, and William Notz, "The Webb-Pomerene Law—Extraterritorial Scope of the Unfair Competition Clause", 29 YALE L. J. 29.

³⁶ 252 U. S. 436, 40 Sup. Ct. 385 (1920).

be wholly unlike one involving a correspondence school³⁷ “wherein there was a continuous interstate traffic in text-books and apparatus for a course of study pursued by interstate commerce”, and more like the cases holding that insurance is not commerce and a case³⁸ in which the court was said to have held that “a broker engaged in negotiating sales between residents of Tennessee and non-resident merchants of goods situated in another state was not engaged in interstate commerce.”³⁹

The general terms of the federal Employers' Liability Law contain no specifications as to when injured employees are engaged in

³⁷ *International Text-book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481 (1910).

³⁸ *Ficklen v. Shelby County*, 145 U. S. 1, 12 Sup. Ct. 810 (1892). This case did not, when decided, proceed on any theory that the broker was not engaged in interstate commerce. It sustained a license on the privilege of doing a general business which included intra-state as well as interstate commerce. The fact that the broker asked for a license which included intra-state business was regarded as controlling. The difficulty of sustaining the case on the theory adduced in the opinion has led the court lately to slide it over the ground that the nature of the brokerage business is one degree removed from interstate commerce.

³⁹ An interesting case under the Federal Trade Commission Act of 1914 is *Federal Trade Commission v. Gratz*, 252 U. S. —, 40 Sup. Ct. 572 (1920). The Commission after notice and hearing had ordered Gratz to desist from refusing to sell ties for cotton bales unless the purchaser bought bagging at the same time. Under the provisions of the statute the defendant applied to the Circuit Court of Appeals to set aside the order of the Commission. The petition was granted for the reason given that the evidence failed to show that the practice complained of was general and that the Commission had not jurisdiction to determine the merits of specific individual grievances. The opinion of the Supreme Court, by Mr. Justice McReynolds, sustains the dismissal of the order of the Commission, on the ground that the complaint issued by the Commission fails to state facts sufficient to show that the defendant's refusal to sell ties without bagging is unfair or detrimental to the public interest. Mr. Justice Brandeis, in dissenting, insisted that the complaint filed by the Commission was sufficient though in general terms, that the Commission is vested with power to forbid “unfair methods” of competition before those methods become established as a general practice, that the Circuit Court of Appeals had found that the specific facts charged were supported by the evidence, and that these facts included sufficient evidence of a dominating position enjoyed by the defendants so that it was not unreasonable for the Commission to find that the methods used amounted to “unfair competition.” Mr. Justice Clarke joined in the dissent. Mr. Justice Pitney confined his concurrence to the result. See 20 COL. L. REV. 806.

interstate commerce so as to come within the Act. This is left to the courts in each individual case. The issue is not the constitutionality of the statute but the constitutionality of its application to a particular state of facts. In four cases during the past term the employee was held to have been engaged in interstate commerce at the time of his injury. The test applied is whether the work being done is so closely related to interstate commerce as to be practically a part of it. *Erie R. Co. v. Collins*⁴⁰ involved an employee who operated a signal tower and water tank, both accessory to the operation of interstate trains. He was hurt by an explosion of the gasoline tank for the pump for the water tank. *Erie R. Co. v. Szary*⁴¹ involved an employee whose job was to dry sand for use in engines some of which were used in interstate commerce. After sanding some engines destined for other states, he emptied the ashes from the stove, took them in a pail across the tracks to the ash pit, emptied the pail, got a drink of water at the engine house, was hit by an engine when crossing the track again to get the pail. In these two cases suit had been brought under the federal law, so the employee guessed right. Justices Van Devanter and Pitney dissented in both cases. In the next two cases the employee sought to come within state compensation acts and got his award only to have the Supreme Court set it aside and hold he should have sued under the federal law. Mr. Justice Clarke dissented in both cases. In *Southern Pacific Co. v. Industrial Accident Commission*⁴² the deceased was killed while wiping insulators supporting a wire carrying power then used in the propulsion of interstate trains. In *Philadelphia & Reading R. Co. v. Hancock*⁴³ the accident occurred to one aiding in transporting from the coal mines a train of cars some of which were destined for other states. The court held that the interstate transportation had already begun, though the crew to which plaintiff belonged took them only to the yard, from which they were taken by another crew to scales ten miles away, after which they were first billed to extra-state consignees. But the shipping clerk at the mine designated the

⁴⁰ 253 U. S. —, 40 Sup. Ct. 450 (1920).

⁴¹ 253 U. S. —, 40 Sup. Ct. 454 (1920).

⁴² 251 U. S. 259, 40 Sup. Ct. 130 (1920).

⁴³ 253 U. S. —, 40 Sup. Ct. 512 (1920).

particular cars that were to go outside the state, and the freight charges were through rates from the mine to the ultimate destination.⁴⁴

In *New York Central R. Co. v. Mohnney*⁴⁵ the question was whether a release of liability contained in a pass should be governed by the state or federal law. This was thought to depend on the question whether the passenger was on a local or interstate journey when the injury occurred, but the character of the journey was determined by the character of the pass on which the plaintiff was travelling. The pass was good only between two points within Ohio. Plaintiff intended to pay his fare from the second Ohio city to a third, where he was to get a promised pass good from there to his ultimate destination in Pennsylvania. Justices Day and Van Devanter thought that under the facts he was on an interstate journey when injured on the first stretch. But Mr. Justice Clarke, for the majority, held that the contract must govern and not the intention of the traveller. As the only contract he had was a pass between two local points, he was on a local journey. "The mental purpose of one of the parties to a written contract cannot change its terms." The application of the decision is doubtless limited to the particular issue before the court, since it was declared that the written contract of release on the pass was the only reliance of the defendant.⁴⁶

⁴⁴ In *Hull v. Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 40 Sup. Ct. 358 (1920), an agreement between two connecting railroads that each might run trains manned by its crews over the line of the other and that each would be responsible for all accidents on its own line was held not to make a person hired by one road an employee of the other when on its line so as to be able to sue the latter under the Employers' Liability Law. Mr. Justice Clarke dissented. See 20 COLUM. L. REV. 709.

In 19 COLUM. L. REV. 395 is a note to *Kinzell v. Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130, 39 Sup. Ct. 412 (1919), and *Philadelphia, B. & W. R. Co. v. Smith*, 250 U. S. 101, 39 Sup. Ct. 396 (1919), two cases decided during the October, 1918, term, and holding employees within the federal Employers' Liability Law. The latter case is also commented on in 6 VA. L. REV. 66. See 68 U. PA. L. REV. 372 for a note on the "Nature of the Services of a Flagman at a Crossing Under the Federal Employers' Liability Act."

⁴⁵ 252 U. S. 152, 40 Sup. Ct. 287 (1920). See 29 YALE L. J. 803.

⁴⁶ In *Fort Smith & W. R. Co. v. Mills*, 253 U. S. —, 40 Sup. Ct. 526 (1920), the Adamson Law was held not to apply to an insolvent railroad in the hands of a receiver which had a wage agreement with its employees who

2. *State Police Power and Interstate Commerce*

The last three cases, which for convenience were included under the head of the power of Congress, belong technically in the group now being considered. The question in each case was whether the subject matter was interstate or local in character. The intra-state pass was held to make the journey on which it was used an intra-state journey at least for the purpose of allowing state law to control the effect of a stipulation in the pass against liability for injury to the holder. In the other two cases state compensation laws were held inapplicable because the injuries were found to be within the scope of the federal Employers' Liability Law. State action on a matter normally within reserved state power was precluded because Congress under its commerce power had taken control of the same matter. The only question was whether the injuries occurred in local or in interstate commerce, since it had previously been settled that Congress had taken within its control the regulation of liability for all injuries to employees engaged in interstate commerce and that the state law could not apply to such injuries even though the federal law provided no remedy. It is not, however, a universal rule that all state action is necessarily precluded by congressional regulation of matters within the general field in question. If the state law is in conflict with the congressional prescription, it is of

not only refrained from making any demands under the Adamson Law but appreciated the situation and desired to continue under the existing agreement.

Kansas City So. Ry. v. Interstate Commerce Commission, 252 U. S. 178, 40 Sup. Ct. 187 (1920), ordered the defendant to obey the Act of Congress in respect to making a physical valuation of the railroads and to ascertain the present cost of condemnation and damages, or of purchase in excess of the original cost or present value, notwithstanding the declarations of the Supreme Court in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729 (1913) that the estimation of such hypothetical cost was "wholly beyond reach of any process of rational determination", was based on an "impossible hypothesis", and would be an indulgence in "mere speculation" and "mere conjecture." The court evidently assumes that the members of the commission are endowed with some supernatural powers which mere judges lack.

For articles on federal control of the railroads, see J. A. Fowler, "Federal Power to Own and Operate Railroads in Peace Time", 33 HARV. L. REV. 775, Gerard C. Henderson, "Railway Valuation and the Courts", 33 HARV. L. REV. 902, 1031, and Fordney Johnston, "The Transportation Act, 1920", 6 VA. L. REV. 482.

course inapplicable. Where the two are not in conflict, the question is whether Congress has meant to cover the whole field or only that part it has specifically dealt with. This was the issue in three cases decided during the last term.

*Pennsylvania R. Co. v. Public Service Commission*⁴⁷ had before it the question whether a state statute requiring a platform and guard rails on the rear end of the last car of trains was precluded by any federal regulation. The car which violated the state statute was a mail car. Mr. Justice Holmes said that the federal rules for the construction of mail cars not only exclude the platform required by the state but provide an equipment for them when used as end cars. They also provide for caboose cars without such platforms as the state requires. Since caboose cars are constantly used as end cars, the federal law makes lawful such an end car as the state law forbids. Mr. Justice Clarke, who alone dissented, looked at the state order as directed at trains rather than at individual cars. He found no evidence that the Interstate Commerce Commission had prescribed how trains should be made up or what sort of cars should be put at the end. Caboose cars are commonly attached to slow-moving freight trains, not to fast-moving express and mail trains. No federal requirement would be interfered with if the railroad carried at the end of its trains the kind of car demanded by the state. The federal rules have a different purpose and therefore have not occupied the whole field of the regulation of trains. But eight members of the court thought otherwise.

In two unanimous decisions it was laid down that Congress had so far taken over the regulation of interstate telegraphic communication as to preclude the application of state laws on matters allowed to be within state control until Congress acts. *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*⁴⁸ negatived the application of the Mississippi doctrine that a stipulation limiting liability for

⁴⁷ 250 U. S. 566, 40 Sup. Ct. 36 (1919). See 5 VA. L. REG. n. s. 719, and 29 YALE L. J. 456.

⁴⁸ 251 U. S. 27, 40 Sup. Ct. 69 (1919). See 33 HARV. L. REV. 988, 14 ILL. L. REV. 525, 5 IOWA L. B. 280, 18 MICH. L. REV. 418, 4 MINN. L. REV. 293, U. PA. L. REV. 259, and 29 YALE L. J. 566. For discussions prior to the decision see W. M. Williams, "Applicability of the Interstate Commerce Act to Telegraph Companies", 90 CENT. L. J. 370, and notes in 18 COLUM. L. REV. 612, and 18 MICH. L. REV. 248.

error in transmitting an unrepeatd message is void as one limiting liability for negligence, and held the contract governed by the contrary rule obtaining in the federal courts. *Western Union Telegraph Co. v. Boegli*⁴⁹ saved the company from a penalty fixed by the law of Indiana for failure to deliver a message promptly. The Act of Congress looked to in both cases for the banishment of state authority was the 1910 Amendment to the Interstate Commerce Act. This allows telegraph companies to establish reasonable rates subject to the control of the Interstate Commerce Commission, requires their rates to be equal and uniform, and permits the classification of messages into day, night, repeated, unrepeatd, etc., with different rates for each class. This specific authorization to vary the rates as a message is repeated or unrepeatd was thought "unmistakably to draw under the federal control the very power which the construction given below to the act necessarily denied." The purpose of Congress in its provisions was said to be to subject interstate telegraph companies to a uniform national rule, and to exclude the possibility of applying varying state laws. The state penalty failed because the state law did not apply. The state rule as to the legality of the limitation of liability failed because, since the subject is under federal law, it is governed by the non-existent federal common law consisting of those principles of general jurisprudence which the federal courts modestly profess to be better able to discover than are their colleagues who sit in state tribunals.⁵⁰

In the absence of congressional regulation, the states are allowed to regulate such interstate commerce as is not "national in character." Only over such commerce as is thought to require uniformity of regulation throughout the country is the mere grant to Congress regarded as a grant of the whole power and therefore a prohibition on the states. And interstate commerce, even though "national in character" and hence such as to require uniformity of regulation, may still be subjected to state requirements in minor matters, provided Congress has not passed inconsistent regulations or taken the whole field within its control. Reiterated formulae as to the ex-

⁴⁹ 251 U. S. 315, 40 Sup. Ct. 167 (1920).

⁵⁰ For notes on the law governing telegraph messages between two points within the same state but routed partly through another state, see 18 MICH. L. REV. 559 and 4 MINN. L. REV. 295.

clusiveness of congressional power over such commerce are saved from formal impairment by saying that the state requirements which are sanctioned do not "regulate" interstate commerce, but merely "incidentally affect" it. Thus "regulate" becomes a word of art which applies, not to all that regulates in fact, but only to that which regulates too much or in some disapproved way. The cases decided during the past term afford two rather striking instances of this tolerant attitude towards state laws thought merely to affect interstate commerce incidentally without regulating it.

Pennsylvania Gas Co. v. Public Service Commission,⁵¹ allowed the New York Public Service Commission to prescribe the rates for natural gas piped from Pennsylvania and furnished to consumers of a New York municipality. There was no break in the continuity of the transmission, as there had been in some previous cases, and the court was clear that such commerce is interstate and that the local rates may affect the interstate business of the company. But the service which was rendered was said to be essentially local, and not one that requires general and uniform regulation of rates by congressional action. Obviously the deciding factor in the case is a judgment that it is better for the rates to be regulated than for the monopoly to demand what it pleases, and that any interference with the freedom of interstate commerce is the lesser of two evils and one readily obviated by national action whenever Congress sees fit.⁵²

*South Covington & Cincinnati St. Ry. Co. v. Kentucky*⁵³ allowed a state Jim Crow car law to apply to an interurban street railway company though eighty per cent. of its traffic was interstate. Mr. Justice Day wrote a dissenting opinion which was concurred in by Justices Van Devanter and Pitney. This pointed out that Ohio, across the river, forbade the separation of passengers according to

⁵¹ 252 U. S. 23, 40 Sup. Ct. 279 (1920). See 68 U. PA. L. REV. 393 and 29 YALE L. J. 926.

⁵² For discussions of an important issue soon to reach the Supreme Court, see Fred O. Blue, "Has the Legislature the Power to Restrict the Sale of the State's Natural Products Into Other States?", 90 CENT. L. J. 154, and Thomas Porter Hardman, "The Right of a State to Restrain the Exportation of Its Natural Resources", 26 W. VA. L. Q. 1, 224.

⁵³ 252 U. S. 399, 40 Sup. Ct. 378 (1920). The same point is affirmed in *Cincinnati, C. & E. Ry. Co. v. Kentucky*, 252 U. S. 408, 40 Sup. Ct. 381 (1920). See 18 MICH. L. REV. 791.

complexion and that to comply with the Kentucky law the company would have to attach an extra car for the six-mile journey in Kentucky. As not over six per cent. of the passengers were colored and on many trips there were no colored passengers at all, the attachment of this extra car was thought to be an unreasonable burden on interstate commerce both in respect to cost and in the practical operation of the traffic. For the majority Mr. Justice McKenna declared that "the regulation of the act affects interstate business incidentally and does not subject it to unreasonable demands." He also relied on the fact that the Kentucky part of the line was separately owned by a Kentucky corporation which, he said, should not be permitted to escape its obligations to the state by running its coaches beyond the state line. But Mr. Justice Day answered that this Kentucky company owned no cars and conducted no operations and that its stock was entirely owned by the defendant company whose business was preponderantly interstate. Mr. Justice McKenna, for the majority, spoke of "the equal necessity, under our system of government, to preserve the powers of the states within their sovereignties as to prevent the power from intrusive exercise within the national sovereignty," but he did not mention a regard for certain strongly-held sentiments which may have influenced the favor shown to the state. It would not be safe to rely on the case as authority for equally great burdens imposed from other motives.⁵⁴

3. *State Taxation and Interstate Commerce*

The recently developed doctrine that the inclusion of extra-territorial values in the assessment of an excise on the local business of foreign corporations doing both local and interstate commerce makes the exaction an invalid regulation of interstate commerce and a taking of property without due process of law finds expression in *Wallace v. Hines*.⁵⁵ The case sustained a preliminary injunction against a North Dakota excise imposed by a statute under which

⁵⁴ For other discussions of state police power in relation to interstate commerce, see Kenneth F. Burgess, "New Limitations Upon State Regulations of Rates", 20 COLUM. L. REV. 660, Julius Henry Cohen, "The New York Harbor Problem in Its Legal Aspects", 5 CORNELL L. Q. 373, and notes in 33 HARV. L. REV. 292, 312, on state control over interstate bridges.

⁵⁵ 253 U. S. —, 40 Sup. Ct. 435 (1920).

“the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line.” The mileage ratio was declared indefensible both because the physical value of a mile of track over the North Dakota plains is worth less than that of a mile in more mountainous and more populous states and because the road in question had valuable terminals and other property in other states with no corresponding assets and facilities in North Dakota. Mr. Justice Holmes puts the principle of the case as follows:

“The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State.”

Two divergent cases on occupation taxes imposed on those selling within the state goods of extra-state origin still in the original package show how fine a line can be drawn between vice and virtue. *Wagner v. Covington*⁵⁶ presented the familiar distinction between sales by peddlers and sales by drummers. An Ohio bottler of soft drinks with a regular line of customers in Covington, Kentucky, was subjected to a license tax on wholesalers. Some of his deliveries were in response to previous specific orders. For these the Kentucky court had held him not taxable. The rest were the result of

⁵⁶ 251 U. S. 95, 40 Sup. Ct. 93 (1919). See 6 VA. L. REV. 378.

fairly assured expectancies, but occasionally the wagons returned from Kentucky to Ohio with some or all of the goods they had taken over to meet the hoped-for demand. Over the silent dissent of Justices McKenna and Holmes, Mr. Justice Pitney for the majority declared:

“Of course the transportation of plaintiffs’ goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the state of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and, this being so, they can claim no immunity from local regulation, whether the goods remain in the original packages or not.”

The previous peddler cases sustaining taxes on sales of goods which, so far as appears, were still in the original packages in which they came from other states, make us curious to know why Justices McKenna and Holmes dissented. The provisions of the ordinance are not set forth in the majority opinion, and it may be that the dissentients did not agree that its general language was properly separable into an invalid tax on concededly interstate sales and a valid tax on those made in Kentucky without prior assured orders. Or they may have thought that the regular and continuous business of supplying the recurring and fairly certain demands of retailers is substantially different from the casual and precarious peddling heretofore held not interstate commerce.

That it was the itinerant character of the vending that put it within the grasp of the state seems fairly clear from the unanimous decision in *Askren v. Continental Oil Co.*⁵⁷ four months later. This held a state license tax inapplicable to sales of gasoline in the barrels in which they had come from another state and to sales of the whole contents of tank cars. Mr. Justice Day, after citing an earlier decision,⁵⁸ declared:

⁵⁷ 252 U. S. 444, 40 Sup. Ct. 355 (1920).

⁵⁸ *Standard Oil Co. v. Graves*, 249 U. S. 389, 39 Sup. Ct. 320 (1919).

“In that case we reaffirmed, what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the federal Constitution the importer of such products from another state into his own state for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasoline brought into the state in tank cars, or original packages, and thus sold, is beyond the power of the state.”

A different attitude was taken towards that part of the business which was said to consist “in selling gasoline in quantities to suit purchasers.” Of such sales Mr. Justice Day said:

“Much is made of the fact that New Mexico does not produce gasoline, and all of it that is dealt in within that state must be brought in from other states. But, so long as there is no discrimination against the products of another state, and none is shown from the mere fact that the gasoline is produced in another state, the gasoline thus stored and dealt in is not beyond the taxing power of the state.”

The best reason for allowing the taxation of these sales would seem to be that the original package was broken to make them. But that is not mentioned by the court. Instead Mr. Justice Day cites *Wagner v. Covington*⁵⁹ without comment. The sales there held taxable were in the original packages. Why should the sale of a full case of ginger ale be held taxable and the sale of a full barrel of gasoline be held not taxable? The only substantial difference between the cases seems to be that the ginger ale was peddled while presumably the purchaser of the gasoline had to come and get it.

In *Shaffer v. Carter*⁶⁰ an Illinois citizen based one of his objections

⁵⁹ Note 56, *supra*.

⁶⁰ 252 U. S. 37, 40 Sup. Ct. 221 (1920). This case will be reviewed more at length in the section on “Taxation”, and references to discussions in law reviews will there be given. Mr. Justice McReynolds dissented but, as he filed no opinion, it cannot be known whether his dissent is based on the commerce clause or on the Fourteenth Amendment or on both.

to an Oklahoma tax on the net income from his Oklahoma oil wells on the ground that the tax was an invalid regulation of interstate commerce. Mr. Justice Pitney answered that the tax since it was not on gross receipts but only upon the net proceeds "is plainly sustainable, even if it includes net gains from interstate commerce." For this he cited the case⁶¹ sustaining the application of the Wisconsin income tax to the net income of a domestic corporation from business within the state. He thus makes it evident that the doctrine of that case is not confined to domestic corporations or to domiciled citizens. Whether it applies only to general state-wide income taxes or covers as well as a special excise on net incomes confined to corporations is a question now before the Supreme Court in cases contesting the corporation income tax law of Connecticut.⁶²

THOMAS REED POWELL.

Columbia University.

(To be continued)

⁶¹ United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 Sup. Ct. 399 (1918).

⁶² For discussions of the Connecticut decision sustaining the tax, see 20 COLUM. L. REV. 324 and 33 HARV. L. REV. 736.

PART II¹

III. TAXATION

TWO important cases sustained objections to applications of the federal income tax. In each there was vigorous dissent. *Evans v. Gore*² held that the constitutional provision that the federal judges shall receive "a compensation which shall not be diminished during their continuance in office" applies to diminution by inclusion of that compensation in the assessment of the general federal tax on net income. The case at bar involved a tax on the 1918 compensation of a judge appointed in 1899. While not directly qualified by anything in the opinion, the decision would seem to have no application to judges appointed after the law taxing their income was first enacted. So also any increase in compensation should be subject to a tax on the books when the increase is accorded. There would be force in the argument that the increase might be accompanied by subjection to a tax on the total compensation, provided the net residue is greater than the salary before the increase. The opinion of the court pointed out that the salary of the President is also protected from diminution and that the tax

¹ For the preceding installment reviewing cases on Miscellaneous National Powers and Regulations of Commerce, see 19 MICH. L. REV. 1-34 (November, 1920).

² 253 U. S. —, 40 Sup. Ct. 550 (1920). Mr. Justice Holmes wrote a dissenting opinion in which Mr. Justice Brandeis concurred. See Edward S. Corwin, "Constitutional Law in 1919-1920," 14 AM. POL. SCI. REV. 635, at pp. 641-644, and notes in 20 COLUM. L. REV. 794; 34 HARV. L. REV. 70, 85; 7 VA. L. REV. 69, 76; and 30 YALE L. J. 75. For a note on the case in the court below, see 18 MICH. L. REV. 697.

on the salary is a diminution thereof. This, too, should have no application to a president who assumes office after the income tax is in force. Unless, therefore, the offending provision in the income tax is formally repealed, it ought to be applicable to all future presidents and judges. It is somewhat surprising that the court should fail to point out this limit to the scope of the decision. Most of Mr. Justice Van Devanter's opinion is a recital of the history of the clause in question and a dissertation on the importance of the independence of the judiciary. Nowhere does he directly refute the contention of the minority that this independence is not threatened by subjection to a burden that is borne equally by all citizens. He insists that taxation is diminution and that diminution of any kind is prohibited by the Constitution. The minority make two other points. One is that the salary had lost its identity before the assessment of the tax on total net income for the year. The other is that the Sixteenth Amendment, giving Congress power to tax income from whatever source derived, specifically authorizes the tax in question. The majority's answer to the latter contention is the one previously accepted by a majority of the court in the Stock Dividend Case, *i. e.*, that the Sixteenth Amendment does not extend the federal taxing power to new subjects, but merely forbids looking at the source of income to ascertain whether a tax thereon is in substance a direct tax.³

The Stock Dividend Case is *Eisner v. Macomber*.⁴ This held

³ For articles on other problems of federal taxation see Arthur A. Ballantine, "Some Constitutional Aspects of the Excess Profits Tax", 29 YALE L. J. 625, Minor Bronaugh, "Regulation of Child Labor by Federal Taxation", 23 LAW NOTES 7, Robert Eugene Cushman, "The National Police Power Under the Taxing Clause of the Constitution", 4 MINN. L. REV. 247, Harry Hubbard, "The Sixteenth Amendment", 33 HARV. L. REV. 794, and Noel Sargent, "Bills for Raising Revenue Under the Federal and State Constitutions", 4 MINN. L. REV. 330. For a note on federal taxation of child labor see 6 VA. L. REV. 535. Cases holding that the federal estate tax is chargeable against the residuary estate and not against specific legacies are discussed in 33 HARV. L. REV. 323, 18 MICH. L. REV. 161, and 29 YALE L. J. 124. The question of statutory construction whether a state inheritance tax may be deducted from the assessment of the federal income tax is considered in 20 COLUM. L. REV. 229, and 30 YALE L. J. 199.

⁴ 252 U. S. 189, 40 Sup. Ct. 189 (1920). See Charles E. Clark, "Eisner v. Macomber and Some Income Tax Problems", 29 YALE L. J. 735, Edward S. Corwin, *op. cit.* 14 AM. POL. SCI. REV. 635, Fred R. Fairchild, "The Stock

by a five to four vote that a stock dividend is capital and not income. A tax thereon is therefore a direct tax which must be apportioned among the states according to population. Mr. Justice Brandeis, in a dissent concurred in by Mr. Justice Clarke, argued that the stock dividend is a transfer by the corporation to the stockholder of a different interest from that which he had before and is substantially similar to a cash dividend or to a dividend in property such as the stock of another corporation, both of which had been held to be income. For the majority Mr. Justice Pitney distinguished these cases by saying that they dealt with transactions in which the stockholder got something with which the corporation had parted. In issuing a stock dividend, however, a corporation retains all its assets. The stockholder gets none of them. He gets nothing but new pieces of paper which reduce the value of his old pieces of paper, so that the old and the new together are worth no more than the old were worth before the split. Mr. Justice Brandeis sought also to analyze the tax on stock dividends as a way of looking through the corporate entity and taxing the stockholder on his interest in the income of the corporation, but postponing the tax until that corporate income takes the form of a stock dividend. To this, Mr. Justice Pitney retorted that, unless the corporation is treated as a substantial entity, separate from the stockholder, there is no income to the stockholder except as the corporation acquires it. Any payment by the corporation to the stockholder is merely a change of the stockholder's money from one pocket to another. The argument of the government that the stock dividend measures the extent to which gains accumulated by the corporation have made the stockholder richer was answered by

Dividend Decision", 5 BULL. NAT. TAX ASS'N. 208, Thomas Reed Powell, "The Stock Dividend Decision and the Corporate Nonentity", 5 BULL. NAT. TAX ASS'N. 201, "The Judicial Debate on the Taxability of Stock Dividends as Income", 5 BULL. NAT. TAX ASS'N. 247, "Stock Dividends, Direct Taxes, and the Sixteenth Amendment", 20 COLUM. L. REV. 536, A. M. Sakolski, "Accounting Features of the Stock Dividend Decision", 5 BULL. NAT. TAX ASS'N. 212, Edward H. Warren, "Taxability of Stock Dividends as Income", 33 HARV. L. REV. 885, and notes in 18 MICH. L. REV. 689, 4 MINN. L. REV. 462 68 U. PA. LAW REV. 394, 6 VA. L. REG. n. s. 220, and 29 YALE L. J. 812. For an article written prior to the decision and submitted to the Supreme Court as part of the brief for Mrs. Macomber, see Edwin R. A. Seligman, "Are Stock Dividends Income?" 9 AM. EC. REV. 517.

saying that this would depend upon how long he had held his stock and that any such enrichment is merely an increase in capital investment and not income. The central position of the majority is that separation and receipt of something are essential to income and that there is no separation and no receipt when the corporation parts with none of its assets. Mr. Justice Brandeis's answer is that substantially the stock dividend is equivalent to a dividend in the stock of a subsidiary and to an extraordinary cash dividend coupled with a preferential opportunity to subscribe to a proportionate amount of newly issued stock, both of which have been held to be taxable income. Mr. Justice Holmes, in a separate dissent concurred in by Mr. Justice Day, concedes that on sound principles a stock dividend is not income, but adds:

"I think that the word 'incomes' in the Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption'.... For it was for public adoption that it was proposed.... The known purpose of this amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of the opinion that the Amendment justifies the tax."⁵

Complaints against state taxation fall under four main heads: (1) lack of jurisdiction; (2) wrongful discrimination; (3) improper procedure for assessment or collection; and (4) exaction of money for purposes not public. This classification will be fol-

⁵ For decisions in suits to recover succession taxes assessed under the Spanish War Revenue Act, see *Henry v. United States*, 251 U. S. 393, 40 Sup. Ct. 185 (1920), and *Simpson v. United States*, 252 U. S. 547, 40 Sup. Ct. 367 (1920). The question when income is received within the meaning of the federal Income Tax Act is considered in *Maryland Casualty Co. v. United States*, 251 U. S. 342, 40 Sup. Ct. 155 (1920). Questions of allowable deductions under the Income Tax Act are answered in *Penn Mutual Life Ins. Co. v. Lederer*, 252 U. S. 523, 40 Sup. Ct. 397 (1920).

For a note on *United States v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214 (1919) which sustained the Harrison Narcotic Drug Act, see 6 VA. L. REV. 535. *Crocker v. Malley*, 249 U. S. 223, 39 Sup. Ct. 270 (1919), dealing with the assessment of the federal income tax on Massachusetts real estate trusts, is considered in 33 HARV. L. REV. 118.

lowed so far as possible, except that all complaints against special assessments will be treated together. Two cases applied the well-established rule that intangibles may be taxed to their owner at his domicile. *Maguire v. Trefry*⁶ approved of a tax at the domicile on income from a trust estate created and administered in another state in which the securities were kept by the trustee. The income tax in question was not a general one, but a substitute for the ordinary tax on intangibles. The subject matter of the tax was said to be "the property right belonging to the beneficiary, realized in the shape of income." Though the legal title to the property was held in another state, the beneficiary was said to have "an equitable right, title and interest distinct from its legal ownership." The case was said to present no difference in principle from the taxation of credits to the creditor at his domicile. Mr. Justice Day wrote the opinion of the court. Mr. Justice McReynolds dissented, without opinion.

*Cream of Wheat Co. v. Grand Forks County*⁷ sustained a tax on the value of the outstanding stock of a domestic corporation, in excess of the value of the real and personal property and certain indebtedness. Mr. Justice Brandeis said that it is not necessary to consider whether the demand is an excise tax or a property tax. It is either on intangibles or measured by them and is therefore good. The absence of tangible property in the state makes no difference. Though the intangible may be taxed at the situs of the tangible with which it is associated, it may also have a situs of its own at the domicile of the corporation. The Fourteenth Amendment does not prohibit bi-state double taxation.⁸

The vice of extraterritoriality can be committed not only by directly taxing property beyond the jurisdiction but also by taking account of such property to increase the assessment of what is concededly taxable. An instance of this appears in *Wallace v. Hines*,⁹ already considered in the sub-section on state taxation of interstate

⁶ 253 U. S. 12, 40 Sup. Ct. 417 (1920). See 90 CENT. L. J. 439.

⁷ 253 U. S. —, 40 Sup. Ct. 558 (1920).

⁸ For a note on taxing a stock-exchange seat as intangible property at the domicile of the owner, see 29 YALE L. J. 916. On the mode of assessing good will see 33 HARV. L. REV. 323. On the situs of property transferred by executors to themselves as trustees under the will see 29 YALE L. J. 467.

⁹ 253 U. S. 66, 40 Sup. Ct. 435 (1920), 19 MICH. L. REV. 30.

commerce. This corrected North Dakota's assumption that it contains as much of the total value of an interstate railroad as the length of the main track in North Dakota bears to the length of the whole line. The opinion declares specifically that this defect is as bad in an excise on foreign corporations as in a tax formally on their property. The exaction is called "an unwarranted interference with interstate commerce and a taking of property without due process of law." Whether it would be a violation of the due process clause if the corporation were not engaged in interstate commerce is not specifically declared, but all the discussion in the opinion is on the evil of assessing extraterritorial values. An old case¹⁰ not explicitly overruled sanctions an excise on a foreign corporation not engaged in interstate commerce though the assessment takes account of total capital stock representing property largely in other states. As elaborated elsewhere,¹¹ this case can be distinguished logically from decisions like *Wallace v. Hines* which adduce the due process as well as the commerce clause to annul similar taxes on foreign corporations engaged partly in interstate commerce. But the tenor of recent opinions makes it pretty evident that the court is prepared to accord to foreign corporations engaged exclusively in local commerce the same relief that it gives to those doing a combined local and interstate business.¹²

Complaints of non-residents against state inheritance and state income taxes include extraterritoriality and discrimination against citizens of other states. The inheritance tax case is *Maxwell v. Bugbee*.¹³ In assessing its inheritance tax on the tangible property and the stock in New Jersey corporations left by non-resident de-

¹⁰ *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403 (1892).

¹¹ "The Changing Law of Foreign Corporations", 33 POL. SCI. QUART. 549, and "State Excises on Foreign Corporations", PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION FOR 1919, page 230.

¹² For notes on the Connecticut corporate excise measured by income, see 20 COLUM. L. REV. 324, and 33 HARV. L. REV. 736. The Connecticut decision has since been affirmed by the Supreme Court. For a discussion of an excise on vehicles measured by their capacity see 33 HARV. L. REV. 737.

¹³ 250 U. S. 525, 40 Sup. Ct. 2 (1919). See Joseph F. McCloy, "Tricks of Taxation Under the New Jersey Inheritance Tax Law", 3 BULL. NAT. TAX ASS'N. 145, and notes in 33 HARV. L. REV. 582, 616, 14 ILL. L. REV. 661, 68 U. PA. L. REV. 184, and 29 YALE L. J. 464.

cedents, New Jersey takes that part of the tax that would have been due on the whole estate, had the decedent been a resident, as the taxable property in New Jersey bears to the whole estate. The effect of this is to use extra-state property to determine the application of the progressive rates of assessment to the New Jersey property. The rate depends not on the amount of New Jersey assets but on the total assets of the estate. The New Jersey assets thus get placed somewhere around the middle of the estate instead of at the bottom. In dissenting from the judgment sustaining the tax, Mr. Justice Holmes for himself, the Chief Justice and Justices Van Devanter and McReynolds observed:

“Many things that a legislature may do if it does them with no ulterior purpose, it cannot do as a means to reach what is beyond its constitutional power.... New Jersey cannot tax the property of Hill or McDonald outside the State and cannot use her power over property within it to accomplish by indirection what she cannot do directly....

It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other states.

New Jersey could not deny to residents in other States the right to take legacies which it granted to its own citizens, and therefore its power to prohibit all legacies cannot be invoked in aid of a principle that affects the foreign residents alone.”

The majority, however, speaking through Mr. Justice Day, invoked the principle sometimes applied that taxes on a privilege may be measured by property not itself subject to levy. The tax is not on property and therefore not on extra-state property. The apparent discrimination against non-residents is not a denial of equal protection of the laws or a violation of the provision that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” The reason is that the discrimination is based on a reasonable classification and not an arbi-

trary one. The resident decedent stands in a different relation to the state than does the non-resident. His whole estate is taxed on its devolution, while not all even of the New Jersey assets of non-residents enter into the assessment of their estates. "The question of equal protection must be decided as between resident and non-resident decedents as classes, rather than by the incidence of the tax upon the particular estates" before the court. Inequalities "that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."¹⁴

The two state income tax cases are *Shaffer v. Carter*¹⁵ and *Travis v. Yale & Towne Mfg. Co.*¹⁶ Mr. Shaffer, who lived in Chicago, did not want to be taxed by Oklahoma on income arising from Oklahoma oil wells. He argued that an income tax is a personal tax and can therefore not be levied on persons not domiciled in the taxing jurisdiction. Mr. Justice Pitney answered that "this argument, on analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under

¹⁴ For articles on inheritance taxation see R. W. Carrington, "Death Duties", 6 VA. L. REV. 568, Charles W. Gerstenberg, "The Importance of Unification of Inheritance Tax Laws", 5 BULL. NAT. TAX ASS'N. 281, Thomas Reed Powell, "Extra-territorial Inheritance Taxation", 20 COLUM. L. REV. 1, 283, Allen Sherman, "Studies in Inheritance Taxation", 13 MAINE L. REV. 78, 127, and Delger Trowbridge, "Inheritance Tax Laws as Affecting Powers of Appointment", 8 CALIF. L. REV. 216.

The following editorial notes deal with inheritance taxation: transfers *inter vivos*, 33 HARV. L. REV. 481, 15 ILL. L. REV. 106; foreign realty under doctrine of equitable conversion, 5 IOWA L. BULL. 278, 29 YALE L. J. 808; suit in foreign state to collect inheritance tax, 5 CORNELL L. Q. 309, 33 HARV. L. REV. 840, 870; whether Hetty Green was doing business in New York within the meaning of the inheritance tax law, 33 HARV. L. REV. 616, 18 MICH. L. REV. 346; transfer of joint account at death of one joint owner, 29 YALE L. J. 465; land devised in fulfillment of contract ordered sold to pay inheritance tax, 29 YALE L. J. 808; extra inheritance tax on property not taxed during lifetime of deceased, 20 COLUM. L. REV. 625.

¹⁵ 252 U. S. 37, 40 Sup. Ct. 221 (1920). See 90 CENT. L. J. 277, 20 COLUM. L. REV. 457, 18 MICH. L. REV. 547, and 29 YALE L. J. 799.

¹⁶ 252 U. S. 60, 40 Sup. Ct. 228 (1920). See references in note 15 *supra*. For articles on the New York income tax written prior to the decision in the principal case see Edwin R. A. Seligman, "The New York Income Tax", 34 POL. SCI. QUART. 521, and "The Taxation of Non-residents in the New York Income Tax", 5 BULL. NAT. TAX ASS'N. 40.

the federal Constitution.” He reviewed what Oklahoma did for Mr. Shaffer’s oil wells and concluded: “That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.” Another ingenious contention levelled against the tax was that the income assessed is the joint product of Oklahoma wells and Chicago intelligence and that since Oklahoma cannot tell how much comes from the earth and how much from extra-state management, it cannot tax any. This was answered by saying that “at most, there might be a question whether the value of the service of management rendered from without the state ought not to be allowed as an expense incurred in producing the income; but no such question is raised in the present case and we express no opinion upon it.” The complaint that non-residents are discriminated against because they are not allowed to deduct losses incurred in other states, as residents are allowed to do, was dismissed by pointing out that residents are taxed on income from other states while non-residents are not. The difference of treatment “is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination.” An interesting question respecting the procedure for collecting the tax will be dealt with in a moment.

*Travis v. Yale & Towne Mfg. Co.*¹⁷ reaffirmed the power of a state to tax the income of non-residents earned within its borders. The principle was declared to cover incomes “arising from any business, trade, profession, or occupation” carried on within the borders of the state. The discussion of the procedure for collecting the tax, which will be considered later, makes it clear that income earned within the state is taxable though the income is paid and received elsewhere. But this New York tax on the income of non-residents was held unconstitutional because residents were allowed personal and family exemptions while non-residents were not. Whether the non-resident must be granted the same exemption as the resident or only such part thereof as his New York income bears to his total income was not considered. The discrimination before the court was held to be forbidden by the

¹⁷ Note 15, *supra*.

clause declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The statute was said to produce, not merely "a case of occasional or accidental inequality due to circumstances personal to the taxpayer," like that in the New Jersey inheritance tax law, but "a general rule, operating to the disadvantage of all non-residents including those who are citizens of the neighboring states, and favoring all residents including those who are citizens of the taxing state." New Jersey and Connecticut citizens compete with New York citizens for New York jobs, as the Constitution gives them the right to do. "Whether they must pay a tax upon the first \$1,000 or \$2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference."

In two other cases corporations insisted that discriminations against them worked a denial of equal protection of the laws. The complainant in *F. S. Royster Guano Co. v. Virginia*¹⁸ was successful. All the court but Justices Brandeis and Holmes thought it arbitrary and unreasonable to make domestic corporations doing some business in the state pay a tax on all their income wherever earned, while domestic corporations doing no business in the state paid on none of their income. Hence they relieved the sufferer from the exaction on its extra-state income. Mr. Justice Brandeis, in dissenting, thought of a reason for the difference of treatment. There were other taxes to which all domestic corporations are alike subjected. Thus the state gets revenue from corporations chartered there but doing all their business elsewhere. This revenue might be lost if such corporations found Virginia's demands so exacting that they changed their domicile to some sister state. Corporations doing business in Virginia would be less apt to try to move. This is to say that it is reasonable to squeeze some and not others when the others have a source of self-help which the some have not.

Though the complainant in *Ft. Smith Lumber Co. v. Arkansas*¹⁹ was sent away comfortless, it had the satisfaction of knowing that Justices McKenna, Day, Van Devanter and McReynolds sympathized with it. They dissented, but without saying why. Under the

¹⁸ 253 U. S. —, 40 Sup. Ct. 560 (1920). See 20 COLUM. L. REV. 793.

¹⁹ 251 U. S. 532, 40 Sup. Ct. 304 (1920).

Arkansas law individual stockholders of domestic corporations were not taxed on their stock, nor were they subject to reassessment of back taxes. To a domestic corporation which desired similar treatment, Mr. Justice Holmes replied for a majority of the court:

“The objection to the taxation as double may be laid on one side. That is a matter of State law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of the tax; short of confiscation or proceedings unconstitutional on other grounds.... We are of opinion that it also is within the power of a State, so far as the Constitution of the United States is concerned, to tax its own corporations in respect of the stock held by them in other domestic corporations, although unincorporated stockholders are exempt. A State may have a policy in taxation.... If the State of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction in the law.

The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State.”

The double taxation referred to was predicated on the fact that the corporation whose stock was taxed to corporate stockholders was itself taxed on all that gave the stock value.

Of four complaints against special assessments, only one got any balm. *Branson v. Bush*²⁰ raised two issues. A railroad insisted that it was denied the equal protection of the laws because the valuation

²⁰ 251 U. S. 182, 40 Sup. Ct. 113 (1919).

of its property for the assessment of a special tax included franchise value. Inasmuch as the statute excluded the value of the franchise to be a corporation, the court, with the exception of Mr. Justice McReynolds, were satisfied that the valuation was confined to that of the real estate estimated by considering the use to which it was put as an integral link in a larger unit, thus applying to special assessments the rule long prevailing as to general property taxation.²¹ The road also insisted that it was not benefited by the improved highway for which it was taxed, and the Circuit Court of Appeals had agreed that the evidence failed to show any such benefit. Mr. Justice Clarke recognized that the former announcement of the Supreme Court that the determination of the legislature as to the area benefited is conclusive had since been subjected to "the qualification, which was before implied, that the legislative determination can be assailed under the Fourteenth Amendment only where the legislative action is 'arbitrary, wholly unwarranted', 'a flagrant abuse and by reason of its arbitrary character a confiscation of particular property'." The absence of any such flagrant abuse in the present case was predicated not only on the specific testimony but on "the obvious fact that anything that develops the territory which a railroad serves

²¹ The District Court had "permanently enjoined the tax to the extent that it was imposed on personal property—the rolling stock and the materials of the company." As to the franchise value which had been included, the court pointed out that the only basis on which to assume that this had been assessed was the presumption that the tax commission had followed the statute and "considered" the franchises. After remarking that this would be "an unusually meagre basis surely for invalidating a tax of the familiar character of this before us", Mr. Justice Clarke continues:

"If, however, the distinction sometimes taken between the 'essential properties of corporate existence' and the franchises of a corporation * * * be considered substantial enough to be of practical value, and if it be assumed that the distinction was applied by the state commission in making the assessment here involved, this would result, not in adding personal property value to the value of the real estate of the company, but simply in determining what the value of the real property was—its right of way, tracks and buildings—having regard to the use which it made of it as an instrumentality for earning money in the conduct of railroad operations. This at most is no more than giving to the real property a value greater as part of a railroad unit and a going concern than it would have if considered only as a quantity of land, buildings and tracks."

For a note on a case holding that pipe lines are personal property and not subject to a special assessment, see 20 COLUM. L. REV. 703.

must necessarily be of benefit to it, and that no agency for such development equals that of good roads.”²²

A like rebuff met the similar contention in *Goldsmith v. Prendergast Construction Co.*²³ that a sewer assessment was invalid because some of the property benefited was excluded from the area charged. The state court had conceded that some of the land in the unburdened region might be drained into the sewer, but it had not thought this sufficient to justify judicial interference with the exercise of the discretion vested in the municipal authorities. “Much less,” says Mr. Justice Day, “do such findings afford reason for this court in the exercise of its revisory power under the federal Constitution to reverse the action of the state courts, which fully considered the facts, and refused to invalidate the assessment.”

Two complaints were directed against the procedure for apportioning benefits as the basis of special assessments. The plaintiff in *Farncomb v. Denver*²⁴ alleged that the hearing proffered by the statute was before a board which had power only to recommend changes in the assessment and that therefore he was denied due process of law. The state court, however, had construed the statute differently and held that the city council could not only hear and recommend but could also determine. This construction was of course binding on the Supreme Court. As the plaintiff had not availed himself of the administrative opportunity open to him, he was denied judicial relief. In *Oklahoma Ry. Co. v. Severns Paving Co.*²⁵ there was some doubt whether the decree of the court below definitely assured a hearing on a re-assessment after the first assessment had been invalidly laid against the owner rather than against the property, and the decree was therefore modified to make certain the right to a hearing.²⁶

²² For a note on an Illinois decision holding that a special assessment for paving could not be levied on lots which were part of a railroad right of way, see 29 YALE L. J. 689.

²³ 252 U. S. 12, 40 Sup. Ct. 273 (1920).

²⁴ 252 U. S. 7, 40 Sup. Ct. 271 (1920).

²⁵ 251 U. S. 104, 40 Sup. Ct. 73 (1919).

²⁶ For a note on taxing stockholders of a national bank without notice to them, see 4 MINN. L. REV. 305.

For a discussion of the question whether the proceeds from the sale of property originally paid for by special assessments must be returned to those previously assessed, see 33 HARV. L. REV. 481.

Objections to the procedure for collecting the Oklahoma and New York income taxes on non-residents were held to be without sufficient foundation. In *Travis v. Yale & Towne Mfg. Co.*²⁷ a Connecticut corporation, having its main place of business in Connecticut, but also carrying on business in New York, thought that New York ought not to be allowed to require it to adjust its system of accounting and paying salaries and wages to the extent required to deduct and withhold the New York tax. Mr. Justice Pitney answered that the withholding provisions applied only to salaries earned in New York, that the company might pay such salaries in New York, and that “the fact that it may be more convenient to pay them in Connecticut is not sufficient to deprive the state of New York of the right to impose such a regulation.” The allegation of an unconstitutional discrimination against citizens of other states because the withholding provisions applied only to non-residents was met by saying that this “does not in any wise increase the burden of the tax on non-residents, but merely recognizes the fact that as to them the state imposes no personal liability, and hence adopts a convenient substitute for it.”

The objection levelled against the procedure for collecting the Oklahoma tax sustained in *Shaffer v. Carter*²⁸ related to the provision imposing a lien upon all the delinquent's property within the state, real and personal. Mr. Justice Pitney said that the objection reduces itself to this:

“that the state is without power to create a lien upon any property of a non-resident for income taxes except the very property from which the income proceeded; or, putting it in another way, that a lien for an income tax may not be imposed upon a non-resident's unproductive property, nor upon any particular productive property beyond the amount of the tax upon the income that has proceeded from it.”

He then stated that the facts of the case do not raise the question, as it appears that the whole of the complainant's property in Oklahoma was used to produce oil and that “his entire business in that

²⁷ Note 16, *supra*.

²⁸ Note 15, *supra*.

and other states was managed as one business, and his entire net income in the state for the year 1916 was derived from that business.” The opinion then proceeds:

“Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the lien will rest upon the same property interests which were the source of the income and on which the tax is imposed. The entire jurisdiction of the state over appellant’s property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction in rem: and we are clear that the state acted within its lawful power in treating his property interests and business as having both unity and continuity. Its purpose to impose income taxes was declared in its own constitution, and the precise nature of the tax and the measures to be taken for enforcing it were plainly set forth in the act of 1915; and plaintiff having thereafter proceeded, with notice of this law, to manage the property and conduct the business out of which proceeded the income now taxed, the state did not exceed its power or authority in treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution or other appropriate process, upon all property employed in the business.”

This leaves unsettled a number of interesting questions certain to arise in the near future. Suppose the sources of income within the state are varied and unrelated to each other, may the whole tax be collected from any one piece of property? Suppose there is no property within the state, may any single payer of income to a non-resident be required to withhold enough to ensure the tax on income paid by others as well? May a tax on income earned within the state be collected by garnisheeing debtors who owe the non-resident capital rather than income? Obviously it will be grievously vexatious to require withholding at the source of the tax on every single dollar of income going to a non-resident, as the state under the *Yale & Town* case may lawfully do. Yet if this is not done, non-residents are apt

to escape paying admitted dues unless some or all of the questions just raised are answered in the affirmative.²⁹

In two of the cases already considered there was dispute as to the propriety of the proceedings chosen by the taxpayer to contest the validity of the tax. Both involved injunctions against state taxes sought from a federal district court, and in both the issue was whether the complainant had an adequate remedy at law. The contention that the suit was in effect one against the state was not made. In *Wallace v. Hines*³⁰ the tax was made a lien on all the property of the railroad, thus putting a cloud upon the title, and delay in paying the tax was visited with considerable penalties. The only remedy at law suggested to deprive equity of the jurisdiction it would otherwise have was that alleged by the state to be offered by a statute saying that "an action respecting the title to property, or arising upon contract may be brought in the district court against the State the same as against a private person." In sustaining the injunction, Mr. Justice Holmes said:

"This case does not arise upon contract except in the purely artificial sense that some claims for money alleged to have been obtained wrongfully might have been enforced at common law by an action of assumpsit. Nothing could be more remote from an actual contract than the wrongful extortion of money by threats, and we ought not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought."

In *Shaffer v. Carter*,³¹ the state procedure for correcting and adjusting tax returns, as interpreted by the state court, was said to fall "short of indicating—to say nothing of plainly showing—" that it "would afford an adequate remedy to a party contending that the income tax law itself was repugnant to the Constitution of the United States." But the decision that it was proper to resort to equity for relief was placed more definitely on this narrower ground:

"For removal of a cloud upon title caused by an invalid lien imposed by a tax valid in itself, there appears to be no legal

²⁹ See Walter N. Seligsberg, "Collection of State Income Taxes from Non-residents", 5 BULL. NAT. TAX ASS'N. 244.

³⁰ Note 9, *supra*.

³¹ Note 15, *supra*.

remedy. Hence, on this ground at least, resort was properly had to equity for relief; and since a court of equity does not 'do justice by halves,' and will prevent, if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill."

In this case the injunction ultimately failed because both the tax and the procedure for its collection were bound to be valid.

In *United States v. Osage County*,³² which allowed the federal government to sue in the federal court to protect certain Indians from wrongful state taxation, "the existence of power in the United States to sue" was said to dispose "of the proposition that because of remedies afforded to individuals under the state law the authority of a court of equity could not be invoked by the United States." Reference was made to the great number of Indians involved and the prevention of multiplicity of suits. *Ward v. Love County*³³ reversed the decision of the Oklahoma court that taxes collected from Indians had been paid by them voluntarily and so could not be recovered back by suit. It was recognized that in general the question whether the taxes had been collected under compulsion after adequate protest is a non-federal one on which the determination of the state court is conclusive. But Mr. Justice Van Devanter pointed out that, if non-federal grounds plainly untenable may be thus successfully put forward in state courts, the power of the United States courts to review the federal question may be defeated. He found that the decision of the state court "that the taxes were paid voluntarily was without any fair or substantial support." The fact that the county might have paid over to the state or municipal bodies some of the taxes thus wrongfully extorted was held not to save it from making a refund to the Indians. On this point the opinion declared:

"As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well-settled rule that 'money got through imposition' may be recovered back;

³² 251 U. S. 128, 40 Sup. Ct. 100 (1919), 19 MICH. L. REV. 17, note 24.

³³ 253 U. S. 17, 40 Sup. Ct. 419 (1920). To same effect, *Broadwell v. Carter County*, 253 U. S. 25, 40 Sup. Ct. 422 (1920).

and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation' ". . . . To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state."³⁴

In the other tax cases that have been considered, the taxing authority did not contest the propriety of the procedure by which the validity of the tax was questioned. Four involved injunctions against state taxes; two in federal courts³⁵ and two in state courts.³⁶ Four were actions brought against the taxpayer,³⁷ and five were suits brought by the taxpayer to recover back taxes paid under protest,³⁸ One was a *certiorari* proceeding to review an assessment, begun in a state court and taken to the United States Supreme Court on writ of error.³⁹

A far-reaching issue of what is a requisite public purpose in exercising the taxing power came before the court in *Green v. Frazier*⁴⁰

³⁴ On the question of what constitutes payment under duress, see 29 YALE L. J. 574.

³⁵ *Branson v. Bush*, note 20, *supra*; *Askren v. Continental Oil Co.*, 252 U. S. 355, 40 Sup. Ct. 355 (1920), 19 MICH. L. REV. 32, note 57.

³⁶ *Farncomb v. Denver*, note 24, *supra*; *Wagner v. Covington*, 251 U. S. 95, 40 Sup. Ct. 93 (1919), 19 MICH. L. REV. 31, note 56.

³⁷ *Cream of Wheat Co. v. Grand Forks County*, note 7, *supra*; *Ft. Smith Lumber Co. v. Arkansas*, note 19, *supra*; *Goldsmith v. Prendergast Construction Co.*, note 23, *supra*; *Oklahoma Ry. Co. v. Severns*, note 25, *supra*.

³⁸ *Evans v. Gore*, note 2, *supra*; *Eisner v. Macomber*, note 4, *supra*; *Maguire v. Trefry*, note 6, *supra*; *F. S. Royster Guano Co. v. Virginia*, note 18, *supra*; *Wagner v. Covington*, 251 U. S. 95, 40 Sup. Ct. 93 (1919), 19 MICH. L. REV. 31, note 56. This last case included also a suit to enjoin the payment of the tax.

³⁹ *Maxwell v. Bugbee*, note 13, *supra*. It should be noted that New Jersey permits a broader use of *certiorari* than do most jurisdictions.

⁴⁰ 253 U. S. —, 40 Sup. Ct. 499 (1920). For notes on cases prior to the Supreme Court decision, see 4 MINN. L. REV. 65, and 29 YALE L. J. 933. For

in which the program of the Non-Partisan League in North Dakota was questioned. The state proposed to raise by taxation and bonds money to inaugurate a state bank, state warehouses, elevators and flour mills, and a state home building association which was to build, buy, sell and lease homes for the citizens of the state. Taxpayers sought an injunction in the state court and lost. The denial of the injunction was affirmed by the Supreme Court, Mr. Justice Day declaring:

“Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its Legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such actions by judicial decision.”

The “peculiar conditions” referred to included the facts that North Dakota is predominantly agricultural, that the existing system of transporting and marketing grain “prevents the realization of what are deemed just prices,” and that a large proportion of the population are tenants moving about from place to place and that an improved opportunity to secure and maintain homes would promote the general welfare. In the course of the opinion Mr. Justice Day said that the court had always declined to give a precise meaning to “due process of law,” preferring “to leave its scope to judicial decision when cases from time to time arise.” Though it has come to be recognized that due process prevents the states from imposing taxes for a merely private purpose, “courts, as a rule, have attempted no judicial definition of a ‘public’ and distinguished from a ‘private’ purpose, but have left each case to be determined by its own peculiar circumstances.” Questions of policy are not for the court, nor is it concerned with the wisdom of the legislation. It is pointed out that the public conduct of these business enterprises stands on a different footing from public gifts to privately conducted businesses. The

articles inspired by the North Dakota program and touching the question of taxation, see Andrew A. Bruce, “The Tyranny of the Taxing Power”, 18 MICH. L. REV. 508, and “State Socialism and the School Land Grants”, 33 HARV. L. REV. 401.

precise question before the court was found to be a novel one, but the case was thought to come within the principle of an earlier decision⁴¹ which found a sufficient public purpose in a municipal coal and wood yard. The decision was unanimous. The North Dakota experiment is thought by some to have a strong flavor of state socialism. If they are right, the federal Constitution appears to allow more room for socialistic experiments than a number of its most fervent eulogists would lead us to infer.⁴²

IV. POLICE POWER

The classification of cases on police power becomes increasingly difficult as we get farther and farther away from the conception of the police power as confined to the rudimentary requirements of health, morals and safety. Classification on the basis of the objects for which the power is exercised is hardly feasible when the same statute manifestly has several objects. Any grouping of cases under the head of "general welfare" would carry a confession of inability to classify. If, however, we regard the relationships, interests and subject matters dealt with, some fairly clear lines of division emerge. True, these lines cross each other so that the same statute may be put into more than one section if any one insists on being nice about it. Yet "food and drink", "occupations and professions," and "physical conditions" make convenient separate heads, even though they embrace statutes which also fall readily under the more general heads of "commercial intercourse," "industrial relations" or "public utilities." It seems best to group under the latter head all cases dealing with business which partakes of the nature of a public-service enterprise, since the police power over such business is of a special kind. This grouping, however, must not be taken as implying that a business can not have one aspect of a public utility without having all. Subjection to price fixing does not necessarily carry with it a duty to serve all. The regulatory power develops in a creep-mouse, crawl-mouse way, and each case is confined to its special facts like all cases on police power.

⁴¹ Jones v. Portland, 245 U. S. 217, 38 Sup. Ct. 112 (1917).

⁴² For notes on the constitutionality of state taxation to provide funds for bonuses or bounties to soldiers in the United States forces, see 33 HARV. L. REV. 846, 871, 18 MICH. L. REV. 535, 699, 4 MINN. L. REV. 233, and 29 YALE L. J. 690.

Of the eighteen police power cases decided during the last term, twelve have to do with requirements on those whose business has some or all of the elements of a public utility. In *Producers' Transportation Co. v. Railroad Commission*,⁴³ the complainant unsuccessfully resisted inclusion in this class. A pipe-line company sought to justify its resistance of the orders of the railroad commission on the ground that "it was constructed solely to carry crude oil for particular producers from their wells to the seacoast under strictly private contracts, and that there had been no carrying for others, nor any devotion of the pipe line to a public use." Mr. Justice Van Devanter conceded that, if the facts were as alleged, the enterprise could not be converted by legislative fiat or administrative order into a public utility. But he sustained the state court and held the company already a common carrier, in view of the facts that it readily admitted new producers and excluded none from the agency agreements it devised, that its charter authorized it to carry on a general transporting business, and that it had exercised the power of eminent domain which it secured only by asserting that it was engaged in transporting oil by pipe line "as a common carrier for hire" and that the right of way sought was "for a public use."⁴⁴

It is familiar that the initiation of a public-utility enterprise does not necessarily carry with it an obligation to continue indefinitely. This finds illustration in *Brooks-Scanlon Co. v. Railroad Commission*⁴⁵ in which a company was allowed to abandon the operation of a narrow-gauge railway which could not be run remuneratively. The state court had sustained the order of the commission forbidding the abandonment, on the ground that the railroad corporation was identical with a lumber corporation and that the entire business of the concern was remunerative. But Mr. Justice Holmes declared that "a carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." After noting qualifications on the principle where obligations are imposed by charter, he continued:

"But that special rule is far from throwing any doubt upon

⁴³ 251 U. S. 228, 40 Sup. Ct. 131 (1920). See 18 MICH. L. REV. 804.

⁴⁴ For a note on "what constitutes a public service", see 26 W. VA. L. Q. 140. See also John B. Cheadle, "Governmental Control of Business", 20 COLUM. L. REV. 438, 550.

⁴⁵ 251 U. S. 396, 40 Sup. Ct. 183 (1920).

a general principle too well established to need further argument here. The plaintiff may be making money from its saw-mill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. *Munn v. Illinois*, 94 U. S. 113, 126. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return.”

The state court had mentioned also that the commission had ordered the company to submit a new schedule of transportation which might be operated at a profit, but this was dismissed by the Supreme Court as a mere makeshift and the language of hope unsupported by any facts.

Of six cases dealing with the imposition of duties on common carriers, two related to the kind and quality of service. *Great Northern Ry. Co. v. Cahill*⁴⁶ followed an earlier decision in holding that it is no part of the duty of a railroad to furnish cattle scales along its right of way, even though the public might be greatly benefited thereby. There is a faint hint in the opinion that there might be circumstances which would raise a question as to some qualification of the doctrine, but the hint seems too faint to cause any fright to carriers. *Sullivan v. Shreveport*⁴⁷ related to the mode of performing a conceded duty. It sanctions an ordinance requiring every street car to be operated by a conductor and motorman, notwithstanding considerable evidence in support of the safety of a new type of one-man car. There was other evidence of the possibility of danger and the certainty of inconvenience from this type of car. Mr. Justice Clarke observes that the operation of cars presents special problems in each community and that the determination of the local authorities should be accepted except in clear cases of arbitrariness.

Two cases required street railroads to help take care of the streets which they use. *Milwaukee Electric Ry. & Light Co. v. Wisconsin*⁴⁸

⁴⁶ 253 U. S. —, 40 Sup. Ct. 457 (1920).

⁴⁷ 251 U. S. 169, 40 Sup. Ct. 102 (1919).

⁴⁸ 252 U. S. 100, 40 Sup. Ct. 306 (1920).

found nothing "inherently arbitrary or unreasonable" in enforcing a general undefined duty to repave a specified portion of the street by requiring a pavement of asphalt upon a concrete foundation when the rest of the street had been so paved by the city. *Pacific Gas & Electric Co. v. Police Court*⁴⁹ held that a requirement on a street railway to sprinkle the streets for a sufficient distance to prevent dust from flying from the operation of the cars is "generically embraced by the police power" and that the power so possessed was "not unreasonably exerted" so as to offend the requirements of due process.

Two cases involved the location of the company's poles and wires. *Hardin-Wyandot Lighting Co. v. Upper Sandusky*⁵⁰ affirmed a state decree enjoining the restoration of poles and wires previously taken down and forbidding new additional construction without the consent of the city, which consent had been made a prerequisite by the statute under which the company had obtained its franchise. Though the decision is confined to restoration and new construction, it does not seem to rest wholly on the reservation in the statute under which the franchise was derived. For Mr. Justice Clarke declares:

"We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for regulation by the exercise of the police power and very certainly the authorities of the municipality immediately interested in the safety and welfare of its citizens are a proper agency to have charge of such regulation."

But this control must be exercised for legitimate police objects and not for the private proprietary advantage of the municipality, as appears from *Los Angeles v. Los Angeles Gas & Electric Corporation*.⁵¹ Here the object of the city in ordering the removal and relocation of poles and other facilities belonging to a lighting company was found to be, not the protection of health and safety, but the displacement of the existing system with one to be constructed by the city. Over the dissent of Justices Pitney and Clarke, this was held a taking without due process of the property rights acquired under the franchise. The city's contentions were said to be based upon a

⁴⁹ 251 U. S. 22, 40 Sup. Ct. 79 (1919). See 29 YALE L. J. 578.

⁵⁰ 251 U. S. 173, 40 Sup. Ct. 104 (1919).

⁵¹ 251 U. S. 32, 40 Sup. Ct. 76 (1919). See 5 VA. L. REG. n. s. 797.

confusion of its governmental powers of police with its field of action in a proprietary or quasi-private capacity. Mr. Justice McKenna declares:

“It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the Fourteenth Amendment forbids. What the grant was at its inception it remained and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated.”

Of five cases relating to rate regulation, only one was directly concerned with the reasonableness of the particular rates fixed. This is *Groesbeck v. Duluth S. S. & A. Ry. Co.*⁵² which rejected several special complaints adduced by the regulating authority against the calculations by which the district court had reached the conclusion that a two-cent fare would not yield the requisite fair return on fair value. The state wished to exclude the results of running sleeping and parlor cars, of operating a branch line used almost wholly for interstate commerce and a parallel line bought from a competitor and used almost wholly for freight traffic, and of running trains on a connecting line over which the complaining company had acquired traffic rights. As to the sleeping and parlor cars, Mr. Justice Brandeis said that the charges are substantially uniform throughout the country and that it would be practically impossible and obviously unwise for the road to abandon the service or to increase the charges to cover the cost of the particular service on its line. The other traffic was over lines on which passengers under the statute were entitled to the two-cent fare, and the court thought it correct to treat all the lines as one, so that the more profitable parts of the system would carry those less profitable. In sustaining the apportionment of expenses between freight and passenger services when the expenses were common to both, Mr. Justice Brandeis recognized that no satisfactory formula had thus far been worked out and said that “for the present, at least, what formula the trial court should adopt presents

⁵² 250 U. S. 607, 40 Sup. Ct. 38 (1919).

a question, not at law, but of fact; and we are clearly unable to say that the lower court erred in adopting the method there pursued." What that method was he did not specify.⁵³

The remaining cases on rate regulation deal with the procedure for fixing the rates and for contesting their reasonableness before the courts. The plaintiff in *St. Louis, I. M. & S. Ry. Co. v. Williams*⁵⁴ sought shelter under the rule that the imposition of severe penalties as a means of enforcing a rate is in contravention of due process of law where no adequate opportunity is afforded the carrier for safely testing before a judicial tribunal the validity of the rate before liability for the penalties attaches. It failed, however, because the court was aware that it might have brought a bill in equity against the railroad commission and have secured a suspension of the penalty provision during the pendency of the proceedings. The remaining question in the case was whether the statutory penalty of from \$50 to \$300 and a reasonable attorney's fee for each exaction in excess of the rate prescribed was so unreasonable as to offend against the requirements of due process. Mr. Justice Van Devanter, speaking for all the court except Mr. Justice McReynolds, observed that the penalty, though large when contrasted with the overcharge possible in any case, might still not unreasonably be justified in view of the numberless opportunities of violating the statute and the need for securing uniform adherence to it. The fact that the penalty went to the aggrieved passenger and might be disproportionate to his loss was held to be immaterial.⁵⁵

⁵³ For notes on "fair value" see 20 COLUM. L. REV. 586, and 15 ILL. L. REV. 45. See also Gerard C. Henderson, "Railway Valuation and the Courts", 33 HARV. L. REV. 902, 1031. In 18 MICH. L. REV. 774, is a note entitled "Public Utility Valuation—Cost-of-Production Theory and the World War." This discusses *Lincoln Gas & Electric Co. v. Lincoln*, 250 U. S. 256, 39 Sup. Ct. 454 (1919), and *United States v. Interstate Commerce Commission*, 252 U. S. 178, 40 Sup. Ct. 187 (1920), 19 MICH. L. REV. 26, note 46. Issues between state and local authorities in respect to fixing rates are considered in 5 CORNELL L. Q. 354, and 15 ILL. L. REV. 100. References to notes on prior contracts fixing rates with respect to their effect on the desires of public utilities for an increase or the desires of local authorities to prevent central authorities from allowing an increase of rates will be given in the section dealing with "Retroactive Civil Legislation."

⁵⁴ 251 U. S. 63, 40 Sup. Ct. 71 (1919).

⁵⁵ For other questions of procedure and of judicial interference, see 8 CALIF. L. REV. 180, 33 HARV. L. REV. 107, and 68 U. PA. L. REV. 287.

The complainant in *Ohio Valley Water Co. v. Ben Avon Borough*⁵⁶ was more fortunate. Under the procedure offered by the state statute the company had appealed from the commission to the superior court of the state and had the order of the commission set aside and the appraisal of its property raised. The state supreme court reversed the court below, holding that there was competent evidence tending to support the commission's conclusion and that no abuse of discretion appeared. This action was thought by a majority of the United States Supreme Court to be based on an interpretation of the state statute which withheld from the court power to determine the question of confiscation according to its independent judgment when the action of the commission is considered on appeal. Such limitation on the reviewing power of the court was held to make the procedure wanting in the requisites of due process. The court was unable to satisfy itself that there was any adequate alternative method of testing the validity of the rates by proceedings in equity and so sent the case back to the state court, declaring that the plaintiff "has not yet had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe the laws of the state including of course section 31 [the section relating to proceedings in equity], the challenged order is invalid."

For the minority, consisting of himself and Justice Holmes and Clarke, Mr. Justice Brandeis urged that the proceedings in equity were adequate and that the order was not invalid for absence of opportunity for full judicial review. He insisted therefore that the order must be affirmed "unless, as contended, the claim of confiscation compels this court to decide, upon the weight of the evidence," whether or not the company's "property has been undervalued, or unless some error of law is shown." On this question, Mr. Justice Brandeis applied the general rule that on writs of error from a state court the Supreme Court must take the facts as found below. As the only disputed question was the value of the property, he insisted that the case did not come within the exception that the Supreme Court may "upon writ of error to a state court 'examine the entire record, including the evidence, to determine whether what purports

⁵⁶ 253 U. S. —, 40 Sup. Ct. 527 (1920).

to be a finding' upon questions of fact is 'so involved with and dependent upon questions of federal law as to be really a decision' of the latter." Even in such case, he added, the Supreme Court must be actuated by the purpose, not to pass upon the relative weight of conflicting evidence and to substitute its judgment thereon for that of the court below, but "to ascertain whether a finding was unsupported by evidence, or whether evidence was properly admitted or excluded, or whether in some other way a ruling was involved which is within the appellate jurisdiction" of the Supreme Court. From this it would appear that what the Fourteenth Amendment requires by way of procedure is an opportunity for a judicial hearing on questions of fact in *some* court and not necessarily in some federal court or in any appellate tribunal. Whether the majority would agree with this is not certain, since their disposition of the case did not require them to affirm or to contradict it. The problem is one on which the law is still soft because of uncertainty as to how far the recognized exceptions cut in to the recognized general rule.

Inadequate procedure was found also in *Oklahoma Operating Co. v. Love*⁵⁷ and in *Oklahoma Gin Co. v. Oklahoma*⁵⁸ in which injunctions were issued against orders of the state railroad commission enforcing prescribed rates and penalizing disobedience. Under the statute in force when the proceedings were instituted the complainants had no opportunity to contest the reasonableness of the rates before a judicial body except on appeal from proceedings before the commission for contempt. The penalties if the appeal were unsuccessful might be \$500 for each overcharge and \$500 additional for each day's continuance of refusal to charge not more than the rates fixed. In the words of Mr. Justice Brandeis, they "are such as might well deter even the boldest and most confident." Before these cases reached the Supreme Court, Oklahoma had seen the error of its ways and had provided for direct appeal to the Supreme Court from the order of the commission. But as the plaintiff was rightly in the federal courts, the suit was ordered to proceed for a determination of the question whether the rates were confiscatory. If such is the conclusion of the district court, it is to enjoin their enforcement in any way. If it finds them not confiscatory, it is still to en-

⁵⁷ 252 U. S. 331, 40 Sup. Ct. 338 (1920). See 18 MICH. L. REV. 804.

⁵⁸ 252 U. S. 339, 40 Sup. Ct. 341 (1920).

join the enforcement of the penalties accrued *pendente lite*, provided it finds that the plaintiff had reasonable grounds to contest the rates as confiscatory.

The statute involved in these two cases was one defining as a public business subject to price fixing any business which by reason of its nature, extent, or the exercise of a virtual monopoly therein, is such that the public must use the same or its services. One complainant ran a laundry and the other was ginning cotton, having combined with competitors to raise prices. The laundry concern had urged before the commission that it was not a monopoly within the section of the statute in question and that the section was void. This seems to be an assertion of an immunity from price fixing; but on the most interesting question whether a laundry can be subjected to rate regulation like an elevator or a railroad, the Supreme Court says not a word. It declared, however, that the commission might proceed to investigate the plaintiff's rates and practices, "so long as its findings and conclusions are subjected to the review of the District Court herein." It can hardly be credited that all the members of the court would consent to the implication that the mere fact that the public must use a laundry makes its charges constitutionally subject to regulation by a commission. Yet the handling of the case in the opinion of Mr. Justice Brandeis is such that it would not be surprising if some of the judges later adduce it as a precedent in favor of the subjection to price-fixing of any business so situated that for a time it is relieved from the competition that keeps its charges reasonably close to what would be enough to attract competitors into the enterprise if the way were open to them.⁵⁹

Direct or indirect regulations of commercial intercourse were approved in four cases. In *Munday v. Wisconsin Trust Co.*⁶⁰ the power to impose conditions on the doing of business by foreign corporations not engaged in interstate commerce was affirmed and applied to a provision invalidating deeds of land within the state to foreign corporations not admitted to do business. The fact that the deed was executed and delivered in another state was said to make no difference, since the court had long ago declared that "the title

⁵⁹ For discussions of the extension of price fixing see references in note 44, *supra*, and notes in 33 HARV. L. REV. 838, 861.

⁶⁰ 252 U. S. 499, 40 Sup. Ct. 365 (1920).

to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate." *Dunbar v. City of New York*⁶¹ found no offence against due process in giving the city a lien on the premises to which water is furnished, even though the meter is installed at the request of the tenant rather than of the owner. A statute forbidding the personal solicitation of employment to "prosecute, defend, present or collect" claims was sustained in *McCloskey v. Tobin*.⁶² Mr. Justice Brandeis pointed out that prohibition of solicitation did not prohibit the business but merely regulated it. He added that "the evil against which the regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty" and that "regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable."⁶³

The remaining case belongs under the head of industrial relations. This is *New York Central R. Co. v. Bianc*⁶⁴ which sustained the provision in the New York Workmen's Compensation Law allowing the commission to award damages for permanent facial disfigurement. Mr. Justice Pitney thought it most likely that any serious disfigurement would impair earning power, irrespective of its effect on mere capacity to work. But the absence of any finding of such impairment in the case before him moved him to declare that impairment of earning capacity is not essential to the constitutionality of an award. He added that the state was at entire liberty to choose whether the award for disfigurement should be paid in a single sum or in instalments and whether it should be made in combination with the compensation for inability to work computed with reference to loss of earning power or independently thereof. Under

⁶¹ 251 U. S. 516, 40 Sup. Ct. 250 (1920).

⁶² 252 U. S. 107, 40 Sup. Ct. 306 (1920). See 6 VA. L. REG. n. s. 213, and 29 YALE L. J. 680.

⁶³ See James W. Simonton, "The Validity of Special Legislation Granting Admission to a Profession", 26 W. VA. L. Q. 102. The attorney's lien law of Pennsylvania is considered in 68 U. PA. L. REV. 277; a discriminatory exemption law, in 19 COLUM. L. REV. 502; a law forbidding the refilling of marked bottles, in 18 MICH. L. REV. 546.

⁶⁴ 250 U. S. 596, 40 Sup. Ct. 45 (1919). See 33 HARV. L. REV. 473, 18 MICH. L. REV. 235, and 29 YALE L. J. 581.

the statute the award might be such sum as the commission deems proper, up to \$3,500. Mr. Justice McReynolds dissented but wrote no opinion. His dissent is doubtless dependent on the fact that the statute imposes liability on the employer irrespective of negligence, as there could be no question about damages for such injuries when the person mulcted is at fault.⁶⁵

This is an unusually small grist of police power cases for the Supreme Court to grind out in a term. Normally it considers more police power questions on a wider variety of subjects. It may be useful to list those subjects, if only to have pegs on which to hang footnotes to discussions in law reviews on decisions in other courts. One is the regulation of "rights of action," but this is more conveniently dealt with in a later section on Jurisdiction and Procedure of Courts. Another is "occupations and professions" under which *McCloskey v. Tobin*⁶⁶ might have been put. A third is "physical conditions"⁶⁷ which might embrace a number of the cases put under the head of public utilities. For the rest we have "food and drink,"⁶⁸

⁶⁵ The Arizona Workmen's Compensation Law, which was declared constitutional in *Arizona Copper Co. v. Hammer*, (Arizona Employers' Liability Cases), 250 U. S. 400, 39 Sup. Ct. 553 (1919), is considered in 20 COLUM. L. REV. 89, 33 HARV. L. REV. 86, 18 MICH. L. REV. 316, and 29 YALE L. J. 225.

See 68 U. PA. L. REV. 363 for a note on a Rhode Island case declaring unconstitutional a statute requiring theatre proprietors to employ a fire guard approved by fire commissioners at a compensation provided in the statute.

⁶⁶ Note 62, *supra*.

⁶⁷ See O. L. Waller, "Right of State to Regulate the Distribution of Water Rights", 90 CENT. L. J. 97. See 20 COLUM. L. REV. 350 for discussion of a case holding invalid an ordinance confining care of cemetery lots to superintendent. See 4 MINN. L. REV. 540 for note on case declaring unconstitutional an ordinance forbidding the erection of a public garage without the consent of adjoining landowners. A case holding a public garage to be a nuisance is discussed in 18 MICH. L. REV. 234, and a similar condemnation of a morgue is treated in 33 HARV. L. REV. 613.

⁶⁸ See Minor Bronaugh, "Limiting or Prohibiting the Possession of Intoxicating Liquors for Personal Use", 23 LAW NOTES 67, and Lindsay Rogers, "'Life, Liberty, and Liquor': A Note on the Police Power", 6 VA. L. REV. 156. *Barbour v. Georgia*, 249 U. S. 454, 39 Sup. Ct. 316 (1919), sustaining a statute prohibiting possession of liquor acquired after its enactment is commented on in 6 VA. L. REV. 60.

"social and moral interests,"⁶⁹ and "methods of enforcement."⁷⁰ Any classification of police power questions is necessarily somewhat arbitrary, but the law of the police power as a whole is so amorphous that even a poor way of classifying is better than none.⁷¹

V. EMINENT DOMAIN

In four of the cases already considered there was complaint that the unwelcome interferences were takings which required compensation. In none of them did the government profess to be exercising the power of eminent domain. In *Hamilton v. Kentucky Distilleries & Warehouse Co.*⁷² which sustained the War Prohibition Act of November 21, 1918, Mr. Justice Brandeis said that "there was no appropriation of the liquor for public purposes." He pointed out that it had never been necessary to decide whether an absolute prohibition of the sale of liquor acquired before the enactment of the prohibitory law is proper and that the question did not arise in the case at bar since the law did not become effective until over seven months after it was passed. The fact that liquor could not be advantageously sold till well ripened or aged was called a "resulting inconvenience to the owner attributable to the inherent qualities of the property itself," which "cannot be regarded as a taking of property in the constitutional sense." The point came up again in *Ruppert v. Caffey*⁷³ which sustained the Volstead Act. The plaintiff contended that "even if immediate prohibition of the sale of its non-

⁶⁹ See 33 HARV. L. REV. 108 for discussion of a state anti-loafing law; 4 MINN. L. REV. 449 on prohibiting foreign languages in public schools; 33 HARV. L. REV. 108 on denying to aliens privilege of running pool rooms; 33 HARV. L. REV. 110 on state law against inciting hostility to the United States; 18 MICH. L. REV. 796 on prohibiting display of flag of organization hostile to our form of government; and 29 YALE L. J. 936 on protection of the United States flag from desecration.

⁷⁰ See 5 IOWA L. BULL. 63 for note on power of health board to detain persons afflicted with venereal disease, and 6 VA. L. REV. 583 for discussion of forfeiture of property of innocent persons used in violation of law.

⁷¹ For a general article on police power see Thomas Reed Powell, "The Police Power in American Constitutional Law", 1 JOURN. COMP. LEG. AND INT. LAW. (part 3) 160.

⁷² 251 U. S. 146, 40 Sup. Ct. 106 (1919), 19 MICH. L. REV. 8, note 11.

⁷³ 251 U. S. 264, 40 Sup. Ct. 141 (1920), 19 MICH. L. REV. 9, note 12.

intoxicating beer is within the war power, this can be legally effected, only provided compensation is made." Mr. Justice Brandeis called attention to the fact that in one of the earliest cases one of the judgments affirmed was "for violation of the act by selling beer acquired before its enactment. . . . and that it was assumed without discussion that the same rule applied to the brewery and its product." He then continued:

"But we are not required to determine here the limits in this respect of the police power of the states; nor whether the principle is applicable here under which the federal government has been declared to be free from liability to an owner, 'for private property injured or destroyed during war, by the operations of the armies in the field, or by measures necessary for their safety and efficiency' . . . ; in analogy to that by which states are exempt from liability for the demolition of a house in the path of a conflagration . . . ; or for garbage of value taken . . . ; or for unwholesome food of value destroyed . . . for the preservation of the public health. Here as in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, *supra*, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use."

This is plainly a stretch of the *Kentucky Distilleries* case, since the Volstead Act became effective on its passage. There is nothing in the dissenting opinion in the Ruppert case indicating specifically that the objectors would have been mollified if the Volstead Act had provided compensation, though Mr. Justice McReynolds refers to the Fifth Amendment and the "well settled rights of individuals in harmless property."

In *Board of Public Utility Commissioners v. Ynchausti & Co.*⁷⁴ which sustained a requirement of free carriage of the mails from vessels engaged in the Philippine coasting trade, the Chief Justice said that "it is impossible to conceive how either the guaranty by the Bill of Rights of due process or its prohibition against the taking of private property for public use without compensation can have the slightest application to the case if the Philippine government possess-

⁷⁴ 251 U. S. 401, 40 Sup. Ct. 277 (1920), 19 MICH. L. REV. 20, note 32.

ed the plenary power, under the sanction of Congress, to limit the right to engage in the coastwise trade to those who agree to carry the mails free." This, no logician would deny. This plenary power having been found, the claim to compensation was denied. But the Chief Justice lays down that if the power had not been plenary as stated, the requirement could not have been sustained "because by accepting a license the shipowners voluntarily assumed the obligation of free carriage." But in *Los Angeles v. Los Angeles Gas & Electric Corporation*⁷⁵ in which the police power was held not to justify an order to remove poles and wires to make room for those of a competing municipal system, there was held to be a taking which was unjustified in the absence of compensation. This is to say that what the city tried to do under the police power, it might do only by an exercise of eminent domain.⁷⁶

In *Hays v. Port of Seattle*,⁷⁷ too, a point of eminent domain was indirectly involved. What was alleged to be an impairment of the obligation of a contract was held to be a breach or repudiation of the contract, leaving such obligation as it had still outstanding. This obligation still formed the measure of the right to recover damages. No denial of due process was involved because whatever property rights were taken were taken for a public purpose, and the provision in the state statutes for suing the state and having the judgment paid out of the state treasury "satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking."

For this, Mr. Justice Pitney cited *Bragg v. Weaver*,⁷⁸ decided a

⁷⁵ Note 51, *supra*.

⁷⁶ For other notes on whether there has been such a "taking" as to require compensation see 33 HARV. L. REV. 451, 476, and 29 YALE L. J. 431.

The determination of what is "just compensation" is considered in 19 COLUM. L. REV. 492, 33 HARV. L. REV. 981, 18 MICH. L. REV. 61, 799, and 68 U. PA. L. REV. 186.

Cases holding it a "public use" to condemn land against use for apartment houses are discussed in 20 COLUM. L. REV. 219, 591, 5 CORNELL L. Q. 330, 18 MICH. L. REV. 523, 4 MINN. L. REV. 50, 236, and 29 YALE L. J. 936.

See also William E. Britton, "Constitutional Changes in Eminent Domain in Illinois", 2 ILL. L. BULL. 497.

⁷⁷ 251 U. S. 233, 40 Sup. Ct. 125 (1920).

⁷⁸ 251 U. S. 57, 40 Sup. Ct. 63 (1919). See 5 VA. L. REG. n. s. 793, and 29 YALE L. J. 577.

month earlier. Here a landowner who sought an injunction against taking earth from his land to repair the highway objected that the statute under which it was done "makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid." After remarking that it was conceded that the taking was for a public use and that adequate provision was made for the payment of such compensation as may be awarded, Mr. Justice Van Devanter declares:

"Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment."

With respect to compensation he continues:

"But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial.... And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal."

These requirements were found to be satisfied by the procedure offered by the Virginia statutes. These had not been construed by the state court, but the only question was whether the landowner was sufficiently protected in his chance to get his appeal to the court from the decision of the supervisors on the award of the viewers. Mr. Bragg seemed to fear that his rights might be foreclosed without his knowledge if he were not present when the supervisors decided how much to pay him. But the court found that under such circumstances he was to be notified and was entitled to thirty days in which to appeal. It was assumed that if he were actually present at the supervisors' meeting, he had sufficient notice and that thirty days from then was long enough in which to appeal. The claim that the

determination of compensation must precede the actual taking was dismissed by saying:

“But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay the taking does not contravene due process of law because it precedes the ascertainment of what compensation is just.”

It is to be remembered that Mr. Justice Van Devanter's general statements throughout the opinion are made with reference to an exercise of eminent domain by public, and not by private, authorities.

PART III¹

VI. RETROACTIVE CIVIL LEGISLATION

FIVE of the corporations which fought in vain against exercises of the police power profited nothing from their grasp at the obligation-of-contracts clause. In *Milwaukee Electric Ry. & Light Co. v. Wisconsin*² the contract relied on was a clause in the charter of a street railroad imposing on it the duty to keep the space between and near its tracks in good repair "with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon." The company contended that "its obligation is, in any event, limited to repaving with such material as the city had last used between the rails." Mr. Justice Brandeis, for all the court except Justices Pitney and McReynolds, answered: "This would put upon the city the burden of paving the whole street in case of any innovation in paving save by agreement of the company and the city. It is not a reasonable construction of the ordinance." This makes the phrase "these spaces *and* the street" equivalent to "these spaces *or* the street." The pavement required of the company was the same as that which the city had laid on all the street but the railway zone. The complaint of the road that the expense would reduce its income below a reasonable return on its investment was answered by saying that "there is no warrant in law for the contention that merely because its business fails to earn full six per cent upon the value of the property used, the company can escape either obligations voluntarily assumed or burdens imposed in the ordinary exercise of the police power."

The contract relied on in *Hardin-Wyandot Lighting Co. v. Upper Sandusky*³ was the statute in force in 1889 when the company's

¹ For the previous installments reviewing cases on Miscellaneous Federal Powers, Regulation of Commerce, Taxation, Police Power and Eminent Domain, see 19 MICH. L. REV. 1-24, 117-151 (November and December, 1920).

² 252 U. S. 100, 40 Sup. Ct. 306 (1920), 19 MICH. L. REV. 138.

³ 252 U. S. 173, 40 Sup. Ct. 104 (1919), 19 MICH. L. REV. 139.

franchise was granted and accepted. This declared that the "mode" of use of the streets "shall be such as shall be agreed upon between the municipal authorities of the . . . village and the company, but if they cannot agree, the probate court of the county shall direct what the mode of use shall be." In 1896 the state law was amended so that it forbade the construction or maintenance of wires, fixtures and appliances for conducting electricity without the consent of the municipality. In 1913 the company took down certain poles and wires used for lighting the streets. The Supreme Court held that it could not restore these or erect new additional ones without obtaining the consent of the city; but it interpreted the injunction granted below as not applying to the repair and replacing of poles and wires which had been continuously used for commercial lighting and affirmed the judgment of the state court with the qualification, "restrained to the scope of its opinion, as we have interpreted it." The case thus rests on the abandonment by the company of its rights under the ordinance of 1889 in its poles and wires used for street lighting. The statute of 1896, requiring the consent of the city, is sustained as a reasonable exercise of the police power; such modification of the company's rights as it may suffer from the decree of the state court is said "not to constitute an impairing of the obligation of its contract with the state or village." In *Pacific Gas & Electric Co. v. Police Court*⁴ the only contract right adduced against a municipal command to sprinkle the streets was the general authority conferred by the franchise to operate a road in the streets; but the ordinance was found to be within the police power, and the police power was said to dominate the right of the company under its franchise to use the streets.

In two cases the contracts unsuccessfully relied on were with private persons rather than with some public authority. *Munday v. Wisconsin Trust Co.*⁵ sustained the state court in holding a deed invalid because the grantee was a foreign corporation which had failed to file the requisite papers with the state in which the land lay. As the obstructing statute was in force before the transaction in question, the court reminded the aggrieved litigant that "the settled doctrine is that the contract clause applies only to legislation

⁴ 251 U. S. 22, 40 Sup. Ct. 79 (1919), 19 MICH. L. REV. 139.

⁵ 252 U. S. 499, 40 Sup. Ct. 365 (1920), 19 MICH. L. REV. 144.

subsequent in time to the contract alleged to have been impaired." Before the suit began the grantee had obtained a license to do business and hold property within the state, but the state court had held that this did not validate prior invalid transactions. This was said by the Supreme Court to be wholly a matter of state law and to involve no right under the Constitution or laws of the United States.

In *Producers' Transportation Co. v. Railroad Commission*⁶ the plaintiff had previously fixed its rates by private contract and now insisted that it was not a common carrier; but the court disagreed with it and allowed the state railroad commission to take it in hand. Mr. Justice Van Devanter reiterated the well-settled rule that "a common carrier cannot, by making contracts for future transportation or by mortgaging its property or pledging its income, prevent or postpone the exertion by the state of the power to regulate the carrier's rates and practices." To make the matter certain, he added: "Nor does the contract clause of the Constitution impose any obstacle to the assertion of that power."

In three cases the contract clause was grasped not as a mere makeweight but as the only hope against legislation concededly within the general police power. In *Bank of Oxford v. Love*⁷ it was recognized that the charter of a bank was a contract, but the provision that the business shall be controlled by the stockholders under such rules and regulations as the company may see fit to adopt was held not to confer any immunity from a statute requiring periodic examination by the state banking department and the imposition of moderate fees for the maintenance of the scrutinizing agency.

In *Piedmont Power & Light Co. v. Graham*⁸ the plaintiff attempted unsuccessfully to spell out an exclusive franchise from a provision in its charter that the town "warrants that it will, by its proper authorities, provide for the full and free use of its streets, lanes," etc. Mr. Justice Clarke called the contention "fatuous and futile," and declared that "grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivocal

⁶ 251 U. S. 228, 40 Sup. Ct. 131 (1920), 19 MICH. L. REV. 137.

⁷ 250 U. S. 603, 40 Sup. Ct. 22 (1919).

⁸ 253 U. S. 193, 40 Sup. Ct. 453 (1920).

cally granted is withheld; nothing passes by implication." The alleged federal question was found so frivolous that the appeal from the court below was dismissed for want of jurisdiction.

A similar summary disposition was given to the appeal in *Cuyahoga River Power Co. v. Northern Ohio T. & L. Co.*⁹ A water-power company which had been granted the right of eminent domain was told that it acquired no exclusive right to any particular lands by filing with its articles of incorporation a plan specifying the places where it planned to erect dams. "The contention of plaintiff," observes Mr. Justice McKenna, "is certainly a bold one, and seemingly erects into a legal principle that unexecuted intention, or partly executed intention, has the same effect as executed intention, and that the declaration of an enterprise gives the same right as its consummation." The acts of a competing company of which the frustrated plaintiff complained were held not acts that might be attributed to the state as an impairment of plaintiff's contract. No wrong was done the plaintiff by incorporating other power companies under the same general law or by sanctioning the transfer of the rights and franchises of a corporation older than itself to one younger.

The contract clause was one of the supports picked out by the successful lighting company in *Los Angeles v. Los Angeles Gas & Electric Corporation*,¹⁰ and figured at least indirectly in the decision. The case held that the city could not compel the company to remove poles and wires to make room for a competing municipal system. Since the attempt was not a valid police measure and was unaccompanied by any proffer of compensation, it was held to be inhibited by the Fourteenth Amendment. But the property rights thus wrongfully threatened seem to be regarded as not confined to property acquired for the purpose of exercising the powers conferred by the franchise, but to embrace also property rights in the franchise itself. To quote Mr. Justice McKenna:

"A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and

⁹ 252 U. S. 388, 40 Sup. Ct. 404 (1920).

¹⁰ 251 U. S. 32, 40 Sup. Ct. 76 (1919), 19 MICH. L. REV. 139. Justices Pitney and Clarke dissent.

substance. It is to be remembered that they came into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law—the payment of compensation.”

The distinction between a breach of contract and an impairment of its obligation finds illustration in *Hays v. Port of Seattle*,¹¹ already considered in the section on eminent domain. Back in 1896 the plaintiff made a contract with the state for excavating part of Seattle harbor, the state engaging “to hold the lands subject to the operation of the contract pending its execution, and subject to the ultimate lien of the contractor thereon.” After long delay and disagreement as to plans, the state in 1913 turned the property over to the Port of Seattle, which proceeded to go ahead with the excavation on its own account. This was held to be nothing but a possible breach by the state of its contract with the plaintiff, Mr. Justice Pitney observing:

“Supposing the contract had not been abandoned by complainant himself or terminated by his long delay, its obligation remained as before, and formed the measure of his right to recover from the state for the damages sustained.”

As the state by general law provided ample opportunity to sue and to collect a judgment against it, and the infliction on the plaintiff, if any, was for a recognized public purpose, an injunction was denied and the plaintiff left to his action for damages.

Two of the tax cases already treated dealt also with objections to retroactive legislation. The plaintiff in *Oklahoma Ry. Co. v. Severns Paving Co.*¹² was told that its charter obligation to pave a portion of its right of way implied no agreement on the part of the city that prevented a special assessment on the railroad right of way to defray part of the expense of paving the main portion of

¹¹ 251 U. S. 233, 40 Sup. Ct. 125 (1920), 19 MICH. L. REV. 149.

¹² 251 U. S. 104, 40 Sup. Ct. 73 (1919), 19 MICH. L. REV. 129.

the street. *Ward v. Love County*¹³ reiterated the point established earlier¹⁴ that a tax exemption of Indian lands granted by Congress was a property right which could not, consistently with due process of law, be taken away by withdrawal of the exemption. This was not directly in issue in the principal case, as the dispute was over the question whether the taxes which the Indians sought to get back had been paid voluntarily. Another case in which a tax exemption, concededly contractual, was held to cover the particular property in question is *Central of Georgia Ry. Co. v. Wright*.¹⁵ This was a rehearing of a portion of a case¹⁶ decided the preceding term. The opinion is merely a postscript to its predecessor and cannot be understood independently.¹⁷

VII. IMMUNITIES OF PERSONS CHARGED WITH CRIME

The unanimity with which the Supreme Court sustained convictions under the Espionage Law in 1918-1919 is broken in upon in 1919-1920. The minority judges, however, do not fully indicate how much of their dissent is based on the First Amendment and how much goes only to the propriety of the convictions under the terms of the statute and the general canons of criminal law. The

¹³ 253 U. S. 17, 40 Sup. Ct. 419 (1920), 19 MICH. L. REV. 133. To the same effect is *Broadwell v. Carter County*, 253 U. S. 25, 40 Sup. Ct. 422 (1920).

¹⁴ *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565 (1912).

¹⁵ 250 U. S. 519, 40 Sup. Ct. 1 (1919).

¹⁶ *Central of Georgia Ry. Co. v. Wright*, 248 U. S. 525, 39 Sup. Ct. 181 (1919), 14 AM. POL. SCI. REV. 63.

¹⁷ For notes on *Union Dry Goods Co. v. Georgia*, 248 U. S. 372, 39 Sup. Ct. 117 (1919), 14 AM. POL. SCI. REV. 61, holding that a public utility can not by contract with its patrons defeat the power of rate regulation, and *Columbus Ry. Power & Light Co. v. Columbus*, 249 U. S. 399, 39 Sup. Ct. 349 (1919), 13 AM. POL. SCI. REV. 632, holding that a company cannot escape from a clause in its franchise restricting the fare to be charged, notwithstanding the increase of operating costs incident to conditions produced by the war, see 33 HARV. L. REV. 97, 116. The latter case is considered in 18 MICH. L. REV. 320. For discussions of the power to fix rates by contract in the grant of a franchise and the power of state authorities to permit an increase of rates as against a contract between the company and a city, and other phases of the same general problem, see Charles K. Burdick, "Regulating Franchise Rates," 29 YALE L. J. 589, N. C. Collier, "Change of Rates of Public Utility Which Have Been Fixed by Franchise Ordinance," 90 CENT. L. J. 42, Clarence Dallam, "The Public Utility and the Public Highway," 6 VA.

offense in the cases was committed by publishing or distributing literature that contained unflattering remarks about the motives and justifications for American participation in the war or that covertly or directly encouraged or advised restraint from actions that would aid in its prosecution. In *Abrams v. United States*¹⁸ it was laid down by Mr. Justice Clarke for the majority that the only question before the court was whether "there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." There was denunciation of the President as vehement as any in a journal devotedly dedicated to uncomplimentary shafts in that direction. The court, however, refrained from passing on the propriety of the convictions on the counts charging "disloyal, scurrilous and abusive language about the form of government of the United States," or language "intended to bring that government into contempt, scorn, contumely, and disrepute." Mr. Justice Clarke remarked that "a technical distinction may perhaps be taken between

L. REV. 35, Godfrey Goldmark, "The Struggle for Higher Public Utility Rates Because of War-time Costs," 5 CORNELL L. Q. 227, A. Raymond Sanborn, "The Power of the Public Utilities Commissions to Alter Rates," 13 MAINE L. REV. 1, and editorial notes in 20 COLUM. L. REV. 704, 5 IOWA L. B. 265, 18 MICH. L. REV. 806, 4 MINN. L. REV. 526, 68 U. PA. L. REV. 280, and 26 W. VA. L. Q. 67.

For a discussion of *United Railroads v. San Francisco*, 249 U. S. 517, 39 Sup. Ct. 361 (1919), 14 AM. POL. SCI. REV. 60, holding that a statute forbidding two railroads to occupy the same street does not enter into a franchise as a promise on the part of the municipal grantor not to compete with the grantee, see 33 HARV. L. REV. 576, 614. The effect on a contract with a city for reduced fares for workmen of a statute prohibiting discrimination is considered in 29 YALE L. J. 563. The retroactive effect of soldiers' and sailors' relief acts is discussed in 4 MINN. L. REV. 353; the amendment of statutes of limitation, in 29 YALE L. J. 91; and the retroactive taking away of a right of action for wrongful death in another state, in 33 HARV. L. REV. 727.

¹⁸ 250 U. S. 616, 40 Sup. Ct. 17 (1919). See Zechariah Chafee, Jr., FREEDOM OF SPEECH (New York, Harcourt, Brace and Howe, 1920), Chapter 3, "A Contemporary State Trial", 33 HARV. L. REV. 747, Edward S. Corwin, "Freedom of Speech and Press Under the First Amendment", 30 YALE L. J. 48, "Constitutional Law in 1919-1920, 14 AM. POL. SCI. REV. 635, at pp. 655-658, M. G. Wallace, "Constitutionality of Sedition Laws", 6 VA. L. REV. 385, John H. Wigmore, "Abrams v. United States: Freedom of Speech and Freedom of Thuggery in War-time and Peace-time", 14 ILL. L. REV. 539, and notes in 20 COLUM. L. REV. 90, 33 HARV. L. REV. 442, 474, 14, ILL. L. REV. 601, 18 MICH. L. REV. 236, 5 VA. L. REG. n. s. 715, 29 YALE L. J. 337, and 30 YALE L. J. 68.

disloyal and abusive language applied to the *form* of our government or language intended to bring the *form* of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war." But he did not press the point, as he found the language fully sufficient to warrant conviction on the counts charging utterances intended to provoke resistance to the United States in time of war and advocating the curtailment of production of ordnance and munitions necessary and essential to the prosecution of the war. This was enough to sustain the sentences, as they did not exceed those that might be imposed for conviction on these counts alone. Among the exhortations of the defendants were the following:

"Yes, friends, there is only one enemy of the workers of the world, and that is CAPITALISM. . . .

With the money which you have loaned or are going to loan them they will make bullets not only for the Germans but also for the Workers' Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans but also your dearest, best, who are in Russia and are fighting for freedom. . . .*

Workers, our reply to the barbaric intervention has to be a general strike.

Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight.*

Know, you lovers of freedom, that in order to save the Russian revolution we must keep the armies of the allied countries busy at home.

We, the toilers of America, who believe in real liberty, shall *pledge ourselves*, in case the United States will participate in that bloody conspiracy against Russia, *to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia."*

For the majority Mr. Justice Clarke declared that "while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe." He had earlier laid down that "it will not do to say . . . that the only intent of these defendants was to prevent injury to the Russian cause," for "men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."

The dissenting opinion of Mr. Justice Holmes is difficult to deal with from the standpoint of constitutional law, as it does not make clear how much it is based on the Constitution. The learned Justice conceded that defendants urged curtailment in the production of things necessary to the prosecution of the war, and that one of the leaflets if published for this purpose might be punishable. He recognized also that "intent" is at common law satisfied by knowledge of facts from which common experience shows that the consequences would follow. He adheres to his previously expressed conviction that "the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." This recognizes that speech which produces such danger is punishable even though the danger is not intended in the strict sense of the word. But Mr. Justice Holmes finds the danger lacking in the present case, for he says:

"Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."

This seems to be the nub of the dissent so far as it goes on constitutional grounds. The majority allow the jury to infer sufficient danger from the circumstances. The minority think the inference

unjustified because of the silliness of the leaflet and the unimportance of its authors. To them the circumstances do not as a mere matter of inference show that degree of danger which is necessary before freedom of speech can be curtailed consistently with the First Amendment. The opinion at this point is plainly concerned with the constitutional issue, for it follows the introduction:

“The power undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right of free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country.”

On the question of the interpretation of the statute the dissenting opinion takes the position that “encouraging resistance” is not satisfied by encouraging abstinence from assistance, and that “intent” must be construed in the strict and accurate sense and not as vaguely used in ordinary legal discussion. The inference from the opinion is that the First Amendment requires either intent in the sense of aim, motive, or object, or else a clearer, nearer danger from the words used than could be thought by a reasonable man to be present in the principal case. There is also the suggestion that the First Amendment limits the degree of punishment for speech concededly punishable, though it may be that Mr. Justice Holmes has the due-process clause of the Fifth Amendment in mind when he says:

“In this case sentences of twenty years’ imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that could pos-

sibly be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here, but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with charges before this Court.”

The concluding clause may refer to Mr. Justice Clarke’s remark on “this particular outbreak of lawlessness, on the part of the defendant alien anarchists.” That the difference of opinion among the judges goes back to a difference in fundamental faiths as to what is most important in the process of government is evident from the concluding paragraph of the dissenting opinion. Mr. Justice Holmes reveals not a little of what constitutional interpretation owes to the fundamental faiths of the judges when he says:

“Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against

attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (Act July 14, 1798, c. 73, 1 Stat. 596) by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.' Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States."

Mr. Justice Brandeis, who joined in this dissent, wrote the dissenting opinion in *Pierce v. United States*,¹⁹ in which Mr. Justice Holmes was again of the minority. This opinion is largely concerned with maintaining that the pamphlet distributed by the defendants did not contain false statements within the meaning of the statute. In insisting that the question of the truth or falsity should not have been left to the jury, Mr. Justice Brandeis observed:

"To hold that a jury may make punishable statements of conclusions or of opinion, like those here involved, by declaring them to be statements of facts and to be false would practically deny members of small political parties freedom of discussion in times when feelings run high and the questions involved are deemed fundamental."

On the constitutional issue, the dissenting opinion relied on the conviction that the nature of the leaflet and the circumstances of

¹⁹ 251 U. S. 205, 40 Sup. Ct. 239 (1920).

its distribution were not such as to create any clear and present danger of harmful results. It refers to the note of despair in the offending tract, with its recognition of the hopelessness of protest under the existing system and the irresistible military might of the government, and says that "it is not conceivable that any man of ordinary intelligence and normal judgment would be induced" thereby to commit offense and run the risk of the penalties. Mr. Justice Brandeis closes by saying:

"The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning and intemperate in language. No objections more serious than these can, in my opinion, reasonably be made to the arguments presented in 'The Price We Pay.' "

Here, as in the *Abrams* case, the majority took the position that whether the printed words would in fact produce as a proximate result the substantive evils which concededly Congress may strive to prevent "is a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution." Intent under the statute and under the Constitution is something that the jury may infer from probable consequences. The words that can be punished are those that have a sufficiently dangerous tendency.

This is reiterated by Mr. Justice McKenna in the majority opinion in *Schaefer v. United States*,²⁰ in which the defendants were convicted of publishing false statements with the intent of promoting the success of the enemies of the United States. The gist of the offending articles was that the motives of Great Britain in entering the war were not so disinterested as they might have been, and that the United States was bluffing and would never send an effective

²⁰ 251 U. S. 466, 40 Sup. Ct. 259 (1920). See 29 YALE L. J. 677.

army to the front. Mr. Justice Brandeis in dissenting insisted that "men, judging in calmness . . . could not reasonably have said that this coarse and heavy humor immediately threatened the success of recruiting." But Mr. Justice McKenna answered:

"Coarse, indeed, this was, and vulgar to us; but it was expected to produce, and it may be did produce, a different effect upon its readers. To them its derisive contempt may have been truly descriptive of American feebleness and inability to combat Germany's prowess, and thereby chill and check the ardency of patriotism and make it despair of success, and in hopelessness relax energy both in preparation and action. If it and the other articles . . . had not that purpose, what purpose had they? Were they the mere expression of peevish discontent, aimless, vapid, and innocuous? We cannot so conclude. We must take them at their word, as the jury did, and ascribe to them a more active and sinister purpose. They were the publications of a newspaper, deliberately prepared, systematic, always of the same trend, more specific in some instances, it may be, than in others. Their effect, or the persons affected, could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for the offense—their 'intent' and 'attempt,' for those are the words of the act—and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny."

Mr. Justice Holmes joined in the dissent of Mr. Justice Brandeis; and Mr. Justice Clarke this time opposed the majority, but not on constitutional grounds. The disagreement between the judges on the constitutional issue comes down to a question of degree as to the extent to which the court will allow the jury to surmise as to the probable effect of the objectionable language. In all the cases which have come before the Supreme Court the defendants were preaching a gospel which, if acted upon, would be a drag on the prosecution of the war. It seems safe to sum up the constitutional law made by the decisions by saying that the First Amendment

confers no immunity on such preaching even when confined to insinuation and innuendo. Yet it would be easy to think of much advocacy which would in fact hamper the conduct of the war much more grievously than any words of those now serving sentence, but which would never be thought punishable if coming from those whose heart is in the popular place. It might be that in dealing with prosecutions under such circumstances Mr. Justice Holmes would find more agreement with his emphasis on the stricter meaning of "intent." He suggests hypothetical cases where patriots, thinking that we were wasting money on aeroplanes or making more cannon of a certain kind than necessary, successfully advocated a curtailment of production which turned out to hinder the prosecution of the war.²¹

Two more espionage cases may be disposed of briefly. In *O'Connell v. United States*²² the court was unanimous in sustaining the Espionage Law and the Selective Service Law on the authority of cases decided since the writ of error was sued out. The latter act was held to cover obstruction by non-official as well as official persons. No question of freedom of speech was involved. *Stilson v. United States*²³ did not review the evidence in any detail and adds nothing to the cases already considered. On one of the counts the government did not press the conviction; Justice Holmes and Justice Brandeis thought that as the sentence was upon a general verdict of guilty on both counts, the judgment should be reversed, but none of their colleagues agreed. The case also held that the trial by an impartial jury guaranteed by the Sixth Amendment does not include the privilege of peremptory challenges and that therefore defendants tried jointly cannot complain that the peremptory challenges are no more numerous than when one is tried alone.

²¹ For general articles on freedom of speech, see Thomas F. Carroll, "Freedom of Speech and the Press in the Federalist Period", 18 MICH. L. REV. 615, Robert Ferrari, "Political Crime", 20 COLUM. L. REV. 308, Fred B. Hart, "Power of Government over Speech and Press", 29 YALE L. J. 410, and Theodore Schroeder, "Political Crimes Defined", 18 MICH. L. REV. 30. Notes on various aspects of espionage and similar laws appear in 20 COLUM. L. REV. 222, 483, 700, 18 MICH. L. REV. 167, 798, and 6 VA. L. REV. 53.

²² 253 U. S. 142, 40 Sup. Ct. 444 (1920).

²³ 250 U. S. 583, 40 Sup. Ct. 28 (1919). See 29 YALE L. J. 363 for comment on the question of challenge involved in the case.

In *Stroud v. United States*²⁴ there were contentions of double jeopardy and self-incrimination. Mr. Stroud had been convicted of murder, with a recommendation by the jury against capital punishment, which under the statute was binding. He asked for a new trial and got it, and this time was convicted of murder, with no recommendation by the jury as to sentence. Under the statute he was sentenced to death. The court found that the first conviction as well as the second was of murder in the first degree and applied the established rule that, since the defendant himself invoked the action of the court which resulted in a second trial, he was not thereby placed in second jeopardy within the meaning of the Constitution.²⁵ Allegations that the jury which brought in the second verdict was not an impartial one, as guaranteed by the Sixth Amendment, were based on the facts that some of the prospective jurors were present at preliminary proceedings at which statements prejudicial to the defendant were made and that the trial court refused to transfer the case to another division of the district. Jurors from the immediate vicinity were, however, excluded from the panel, and Mr. Justice Day said that "matters of this sort are addressed to the discretion of the trial judge, and we see nothing in the record to amount to abuse of discretion such as would authorize an appellate court to interfere with the judgment." The complaint of self-incrimination was founded on the refusal of the trial court to grant an application for a return to the defendant of letters written by him in prison and turned over by the warden to the district attorney. The court answered that the letters were voluntarily written, that no threat or coercion was used to obtain them, nor were they seized without process, and that having come into the possession of the prison officials "under established practice, reasonably designed to promote the discipline of the institution * * * there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights."

²⁴ 251 U. S. 15, 40 Sup. Ct. 50 (1919). See 5 VA. L. REV. n. s. 882, and 6 VA. L. REV. 457. For a rehearing on the question of challenge under the statute, see *Stroud v. United States*, 251 U. S. 380, 40 Sup. Ct. 176 (1920).

²⁵ For discussions of double jeopardy, see 68 U. PA. L. REV. 70, on former conviction for robbery as a bar to prosecution for murder, and 6 VA. L. REV. 372, on the same act as an offense against the state and a municipality.

A different result was reached in *Silverthorne Lumber Co. v. United States*.²⁰ Governmental officials raided the offices of a corporation after arresting its officers, took away papers without any search warrant, photographed them, retained photographs and copies after returning the originals by order of the court upon application by the defendants, framed a new indictment on the basis of the knowledge thus gained, and then obtained a subpoena to produce the originals. For refusing to obey the subpoena the corporation and one of its officers were found guilty of contempt. The Supreme Court held the subpoena unlawful as a violation of the constitutional prohibition against unreasonable searches and seizures. As Mr. Justice Holmes puts it:

“The proposition could not be presented more nakedly. It is that, although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and may then use the knowledge that it has gained to call upon the owners in more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act.”

It had already been held that papers so seized could not, after proper objection, be laid directly before the grand jury. The idea that this means only that two steps are required instead of one was said to reduce the Fourth Amendment to a form of words. Mr. Justice Holmes then continues:

“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the

²⁰ 252 U. S. 385, 40 Sup. Ct. 182 (1920). See 8 CALIF. L. REV. 347, 20 COL. L. REV. 484, 33 HARV. L. REV. 869, 4 MINN. L. REV. 447, 6 VA. L. REG. n. s. 223, and 29 YALE L. J. 553.

Government's own wrong cannot be used by it in the way proposed."

The protection of the decision was accorded to the corporation as well as to the aggrieved individual. While corporations are not privileged to refuse to produce self-incriminating books and papers, as individuals are, under a judicial blending of the search-and-seizure and self-incrimination clauses of the Fourth and Fifth Amendments, "the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in another way." The case is rested on the Fourth Amendment without any admixture of the Fifth with its privilege against self-incrimination. Chief Justice White and Mr. Justice Pitney dissented, but without opinion.²⁷

The clause of the Sixth Amendment entitling persons accused of crime against the federal government to trial "by an impartial jury of the state and district wherein the crime shall have been committed" is involved in *Gayon v. McCarthy*,²⁸ though the issue does not appear to have been raised by the accused. Gayon while in New York conspired with persons in Texas, and the acts of his fellow conspirators in Texas were declared to establish the jurisdiction of the federal district court in Texas to indict Gayon.²⁹ This case and another³⁰ passed on procedural questions relating to removal of the accused from one federal district to another. A third case³¹ involved similar questions of procedure in arrest for extradition to a foreign country.³²

²⁷ For discussions of self-incrimination, see A. M. Kidd, "The Right to Take Finger-prints, Measurements and Photographs", 8 CALIF. L. REV. 25, D. O. McGovney, "Self-Criminating and Self-Disgracing Testimony", 5 IOWA L. BULL. 175, Roy Cleasey Merrick, "The Privilege Against Self-Incrimination as to Charges of Contempt", 14 ILL. L. REV. 171, a note in 8 CALIF. L. REV. 241 on powers exercised under the federal Trade Commission Act, and a note in 14 ILL. L. REV. 644 on self-incrimination under the National Prohibition Act.

²⁸ 252 U. S. 171, 40 Sup. Ct. 244 (1920).

²⁹ For question of venue for trial when blow is in one county and death in another, see 20 COLUM. L. REV. 619, and 33 HARV. L. REV. 843, 863.

³⁰ *Stallings v. Splain*, 253 U. S. 339, 40 Sup. Ct. 537 (1920).

³¹ *Collins v. Miller*, 252 U. S. 364, 40 Sup. Ct. 347 (1920).

³² *Caldwell v. Parker*, 252 U. S. 376, 40 Sup. Ct. 388 (1920), held that a

VIII. JURISDICTION AND PROCEDURE OF COURTS

1. *The Extent of Federal Judicial Power*

An attempt by a citizen of New Jersey to sue that state in an original proceeding in the Supreme Court of the United States was readily frustrated in *Duhne v. New Jersey*.³³ The bill was brought to enjoin the enforcement of the Eighteenth Amendment. The only possible ground for starting such a proceeding in the Supreme Court was that the suit was one in which a state is a party. But the court pointed out through the Chief Justice that the third section of Article III, which describes the original jurisdiction of the Supreme Court, "relates solely to the grounds of federal jurisdiction" conferred in the preceding section, "and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given." Since it is well settled that the federal judicial power does not embrace a suit brought by a citizen against a state without its consent, the contention of the plaintiff was said to come "to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no federal judicial power is conferred." Permission to file the bill was therefore refused. Whether the action was one against the federal government, in so far as it sought to enjoin federal officers, was not considered, inasmuch as the action against those officers had no claim to be brought originally in the Supreme Court, and the effort necessarily fell flat

soldier in the army charged with the murder of a civilian is within the jurisdiction of state courts even in time of war, since the Articles of War do not clearly make the jurisdiction of courts martial exclusive.

For discussions of the Court-martial system, see S. T. Ansell, "Military Justice", 5 CORNELL L. Q. 1, George Gleason Bogert, "Courts-Martial: Criticisms and Proposed Reform", 5 CORNELL L. Q. 18, and Edmund M. Morgan, "Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War", 4 MINN. L. REV. 79, and "The Existing Court-Martial System and the Ansell Army Articles", 29 YALE L. J. 52.

See 18 MICH. L. REV. 810 for discussion of question whether a criminal statute is void for indefiniteness; 33 HARV. L. REV. 449, 473, for differing penalties for men and women under equal protection of the laws; and 6 VA. L. REV. for imprisonment for non-payment of alimony.

³³ 251 U. S. 311, 40 Sup. Ct. 154 (1920). See 5 VA. L. REG. n. s. 881, and 29 YALE L. J. 471.

when it was determined that the plaintiff could not hale the state before that court.³⁴

An effort by the Secretary of the Treasury to resist proceedings brought against him in the Supreme Court of the District of Columbia, on the ground that the suit was one against the United States, met with defeat in *Houston v. Ormes*.³⁵ The proceeding was one by an attorney to establish an equitable lien for her fees in a fund in the treasury of the United States appropriated to pay a claim found by the Court of Claims to be due her client. The client had been made a party and had appeared and unsuccessfully defended. This was held to get rid of the objection that debts due from the United States have no *situs* at the seat of government and that therefore the decree against the secretary in favor of the attorney could not protect the government from subsequent suit by the client. The federal statute forbidding the assignment of claims against the government was put to one side as not standing in the way of assignment by operation of law after the claim has been allowed. This left only the question whether the suit to establish a lien on the fund was a suit against the United States. As to this, Mr. Justice Pitney said:

“But since the fund in question has been appropriated by act of Congress for payment to a specified person in satisfaction of a finding of the Court of Claims, it is clear that the officials of the Treasury are charged with the ministerial duty to make payment on demand to the person designated. It is settled that in such a case a suit brought by the person entitled to the performance of the duty against the official charged with its performance is not a suit against the government.”³⁶

The extent of the admiralty jurisdiction was involved in two cases already dealt with. In *Peters v. Veasey*,³⁷ a longshoreman

³⁴ See 4 MINN L. REV. 364 for a discussion of a provision in the Virginia constitution held to be self-executing and to give the right to sue the state and its subdivisions without further legislative action.

³⁵ 252 U. S. 469, 40 Sup. Ct. 369 (1920).

³⁶ For consideration of other instances in which suit was resisted as one against the United States, see 8 CALIF. L. REV. 342, 20 COLUM. L. REV. 217, 5 CORNELL L. Q. 203, and 33 HARV. L. REV. 322.

³⁷ 251 U. S. 121, 40 Sup. Ct. 65 (1919).

injured on a ship by falling through a hatchway, and in *Knickerbocker Ice Co. v. Stewart*,³⁸ a bargeman injured when doing unnamed work said to be of a maritime nature, were held not entitled to the remedies of state compensation laws. There appeared to be no dispute in either case that the injury was within the admiralty jurisdiction. The decision that Congress could not permit the application of state compensation laws has already been reviewed.³⁹

The question whether a case is within the federal jurisdiction because one arising under the Constitution of the United States necessarily involves an interpretation of the clause of the Constitution relied on by the party who seeks to get into the federal courts. The Supreme Court has developed the practice of saying that it has no jurisdiction to answer frivolous questions or questions already completely disposed of. So it turns down preposterous objections by dismissing them for want of jurisdiction. There is, of course, only a formal difference between such procedure and the alternative one of entertaining jurisdiction and holding the objection one worth making but nevertheless ill-founded. Cases in which substantive federal questions have actually been disposed of have been treated together in this review, whether or not objection was raised to the exercise of jurisdiction.

The question whether the suit arose under a law of the United States was the issue in *Pell v. McCabe*.⁴⁰ This was a bill brought in the district court to enjoin a suit for fraud against the petitioner who in previous bankruptcy proceedings brought primarily against others had been determined not to be a general partner and therefore not subject to having his assets administered in the bankruptcy proceedings. The later suit against him for fraud was held to be quite independent of anything adjudicated in the bankruptcy proceedings and therefore one properly within the jurisdiction of the state court and not to be enjoined by the federal court by reason of its jurisdiction over bankruptcy matters. In *First National Bank v. Williams*,⁴¹ however, a suit by a national bank against the controller of the currency to enjoin alleged harassing actions on his

³⁸ 253 U. S. 149, 40 Sup. Ct. 438 (1920).

³⁹ 19 MICH. L. REV. 13-14.

⁴⁰ 250 U. S. 573, 40 Sup. Ct. 43 (1919).

⁴¹ 252 U. S. 504, 40 Sup. Ct. 372 (1920).

part was held to be one in which the right to recover turns on the construction and application of the National Banking Act, and therefore one arising *under* that act, even though not expressly authorized by it to be brought. It followed from this that under another statute the comptroller might be sued in the district where the bank is located.

In such cases as the foregoing it is often difficult to tell whether the issue is constitutional or merely one of statutory construction. When jurisdiction is entertained, the case is of course within the federal judicial power. But jurisdiction may be denied solely for want of statutory warrant for entertaining it. Sometimes the statutory limits are coterminous with the constitutional limits and sometimes not. Clearly questions whether the judgment below is a final one,⁴² whether the federal issue is raised in season,⁴³ whether

⁴² *Ex parte Tiffany*, 252 U. S. 32, 40 Sup. Ct. 239 (1920), held final an order of the district court denying an application to require a receiver to turn over property to a receiver appointed by a state court. *United States v. Thompson*, 251 U. S. 407, 40 Sup. Ct. 289 (1920), held a ruling sustaining a motion to quash an indictment to be a "decision or judgment sustaining a special plea in bar" so as to authorize the government to take a direct writ of error from the district court to the Supreme Court under the Criminal Appeals Act. The case held also that the Pennsylvania rule that a grand jury may not, without leave of court, bring in a new bill on matters previously submitted to another grand jury, is not the common law, as rightly perceived, and therefore not the rule for federal courts. The federal rule is not statutory, but is the product of the federal court's superior conception of the common law. The Pennsylvania rule is not adopted as the rule for federal courts by section 722 of the Revised Statutes, for that applies only in the absence of a federal rule on the subject. *Collins v. Miller*, 252 U. S. 364, 40 Sup. Ct. 347 (1920), held a decision of the district court not final because it disposed finally of only a part of the case. The Supreme Court raised of its own motion the question of the lack of finality. It remarked *obiter* that the construction of a treaty by the district court in a final decision is subject to direct review by the Supreme Court. *Oneida Navigation Corporation v. W. & S. Job & Co.*, 252 U. S. 521, 40 Sup. Ct. 357 (1920) held not final the dismissal by the district court of a petition to bring in another defendant alleged to be liable for a collision. Here again the Supreme Court raised the question of finality of its own motion. See 33 HARV. L. REV. 1076 for a note on finality of decision for purposes of appeal.

⁴³ *Godchaux Co. v. Estinople*, 251 U. S. 179, 40 Sup. Ct. 116 (1920) held it too late to raise a federal question for the first time on a petition for a rehearing in the state supreme court, where that court does not actually enter-

the suit involves the requisite amount to be brought in the federal courts,⁴⁴ and whether the complaint goes to the validity of some authority exercised or only to some other right, title or interest under the federal Constitution or laws,⁴⁵ are questions solely of statutory construction. No constitutional issue seems to be involved in decisions dismissing a bill because the question raised has become

tain the petition and pass on the objection. *Mergenthaler Linotype Co. v. Davis*, 251 U. S. 256, 40 Sup. Ct. 133 (1920), affirms the same point, and also decides that the state decision was final. *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U. S. 341, 40 Sup. Ct. 331 (1920), holds the federal question presented too late when first raised on petition for writ of error filed in the federal Supreme Court. Objection was seasonably raised to introducing in evidence a charter, but its reception in evidence was held to violate no federal right.

⁴⁴ *Chesbrough v. Northern Trust Co.*, 252 U. S. 83, 40 Sup. Ct. 237 (1920), refused to order the district court to dismiss for want of jurisdiction an action for tort in which the alleged damages exceeded the prescribed amount and there was nothing to show that such a recovery was impossible or that there was bad faith. *Scott v. Frazier*, 253 U. S. 243, 40 Sup. Ct. 503 (1920), ordered a bill dismissed for want of allegation that the amount in controversy equals that required by the statute. See 33 HARV. L. REV. 477 for a note on good faith in alleging the amount in controversy.

⁴⁵ *Mergenthaler Linotype Co. v. Davis*, 251 U. S. 256, 40 Sup. Ct. 133 (1920), note 43, *supra*, held that the claim that a lease contract was an interstate-commerce contract and therefore not subject to state statutes does not challenge the validity of the statute so as to justify a writ of error from the state court, but at most asserts a right, title, or interest under the federal Constitution which might be the basis for a writ of certiorari. *Jett Bros. Co. v. City of Carrollton*, 252 U. S. 1, 40 Sup. Ct. 255 (1920), held that a complaint that petitioner's property was assessed at full value while other property was assessed at thirty or forty per cent of its value does not question the validity of a statute or an authority exercised under it as against the Constitution of the United States so as to warrant a writ of error. Mr. Justice Day says that "the mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis of a writ of error to this court." This case repeats that it is too late to raise the federal question on petition for a rehearing in the state court when that court does not give it consideration. For an extensive note on the considerations determining whether writ of error or certiorari is the proper device to bring a case from the state court to the United States Supreme Court, see 33 HARV. L. REV. 102. The cases outlined in the present note and in the two preceding do not exhaust the list of those in which the Supreme Court considered similar issues during the past term, but are given merely to illustrate the blunders that occur in matters of practice.

moot by the amendment of a statute,⁴⁶ or allowing an alien enemy to proceed as party plaintiff where adequate precautions are taken against paying a judgment to him personally,⁴⁷ or holding that a soldier in the army charged with the murder of a civilian is within the jurisdiction of a state court even in time of war, since the Articles of War do not clearly make the jurisdiction of the courts martial exclusive.⁴⁸ The reports of the decisions of each term are crowded with disputes on questions of federal practice. The ignorance and/or the perversity of attorneys impose on the Supreme Court an excess of unnecessary burden. The burden appears not only in the cases in which opinions are written but still more in the many instances in which decisions are disposed of in a memorandum. Cases of this latter character are not included in this review. Needless to say, they frequently represent the determination of a constitutional question. If the question is not regarded by the Supreme Court as one worth discussing, the reviewer may perhaps be pardoned for emulating its example.⁴⁹

⁴⁶ *United States v. Alaska S. S. Co.*, 253 U. S. 113, 40 Sup. Ct. 448 (1920).

⁴⁷ *Birge-Forbes Co. v. Heye*, 251 U. S. 317, 40 Sup. Ct. 160 (1920).

⁴⁸ *Caldwell v. Parker*, 252 U. S. 376, 40 Sup. Ct. 388 (1920).

⁴⁹ For other discussions of the jurisdiction of the federal courts see Armistead M. Dobie, "Jurisdiction of the United States District Court as Affected by Assignment", 6 VA. L. REV. 553, and notes in 33 HARV. L. REV. 970, 985, and 6 VA. L. REV. 124.

Discussions of various aspects of the judicial interpretation of constitutional limitations will be found in George J. Danforth, "The Influence of the Lawyer upon the Trend of Modern Legislation", 89 CENT. L. J. 392, W. F. Dodd, "The Problem of State Constitutional Construction", 20 COLUM. L. REV. 635, "Implied Powers and Implied Limitations in Constitutional Law", 29 YALE L. J. 137. W. L. Jenks, "Judicial System of Michigan Under the Governor and Judges", 18 MICH. L. REV. 16; Shippen Lewis, "Revising the Constitution of Pennsylvania", 68 U. PA. L. REV. 120, Fred A. Maynard, "Five to Four Decisions of the Supreme Court of the United States", 89 CENT. L. J. 206, William Renwick Riddell, "The Constitutions of the United States and Canada", 4 MINN. L. REV. 165, and G. Sweetman Smith, "Judicial Encroachment upon the Legislative Prerogative", 3 BI. MON. L. REV. 1.

The practice of foreign countries in respect to declaring laws unconstitutional is considered in 8 CALIF. L. REV. 91. In 5 CORNELL L. Q. is a note on the right of a legislature to validate an act previously declared invalid by the courts. The duty of federal courts to follow the law of the state in cases where jurisdiction is obtained by diversity of citizenship is treated in 20

2. *Requisites of Jurisdiction over Defendants*

The question in *Chipman v. Thomas B. Jeffrey Co.*⁵⁰ was whether a Wisconsin corporation formerly doing business in New York, which had complied with the New York statute and designated a New York agent on whom process against it might be served, is subject to suit in New York on an extra-New-York cause of action after it has ceased to do business in New York but before it has revoked the designation of its New York agent. The case was started in the New York court and removed to the federal district court on motion of the defendant. In that court a motion was made to have the service set aside for lack of jurisdiction over the so-called person of the defendant. The district judge granted the motion and his action was affirmed by the Supreme Court. But the reason given was that the New York courts had said that "unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents." Of course the validity of the service depended primarily upon the statute. If the statute did not authorize service in the case in question there was no constitutional issue. The Supreme Court, however, was careful to guard against any inference that it would have approved of such an exercise of jurisdiction had it been found warranted by the statute. For Mr. Justice McKenna says that "in resting the case on the New York decisions we do not wish to be understood that the validity of such service as here involved would not be of federal cognizance." Perhaps a hint of what the Supreme Court thinks about the constitutional issue may be gathered from the comment that the state court in sustaining service in a case in which the corporation was doing business within the state showed a conscious solicitude of the necessity of making that the ground of its decision.⁵¹

COLUM. L. REV. 612. The requirement that state courts must follow the federal rule of burden of proof in cases under the federal Employers' Liability Law is discussed in 33 HARV. L. REV. 861.

⁵⁰ 251 U. S. 373, 40 Sup. Ct. 172 (1920). See 20 COLUM. L. REV. 618, 33 HARV. L. REV. 730, and 29 YALE L. J. 554.

⁵¹ For notes on jurisdiction over foreign corporations, see 20 COLUM. L. REV. 205, 33 HARV. L. REV. 114, 14 ILL. L. REV. 653, and 29 YALE L. J. 567. Jurisdiction for divorce or annulment of marriage is treated in 20 COLUM. L. REV. 479, and 5 CORNELL L. Q. 174; service of process on a person in the

3. *Procedural Requirements*

An interesting question touching the inherent powers of federal courts and the restriction on those powers by the guarantee of trial by jury contained in the Seventh Amendment arose in *In re Peterson*.⁵² Judge A. N. Hand of the district court appointed an auditor in an action at law on a contract, instructed him to examine the accounts of the parties, gave him power to take testimony and compel the attendance of witnesses, and ordered him to file a report with the clerk with a view to simplifying the issues for the jury. The auditor was to make no final determination and his report was to be merely evidence to submit to the jury, which was to retain the power of final determination of all issues of fact in the case. An original petition was brought in the Supreme Court for writs of mandamus and/or prohibition directed to Judge Hand to restrain him from proceeding in this manner and to direct him to restore the case to the calendar for trial in the usual way. Leave to file the petition was granted;⁵³ but, after hearing, the petition was denied. The Seventh Amendment was held not to forbid changes in practice or procedure or new methods of determining what facts are in issue. The auditor's task of simplifying the issues was called a function in essence the same as that of pleading. The proposed admission of his report as evidence was likened to statutory provisions making the findings of administrative commissions *prima facie* evidence. As the jury was to be free to deal with this report as with any other evidence and the parties were not restricted in the introduction of other evidence, the constitutional right to trial by jury was not impaired. It was recognized that the Seventh Amendment would forbid a compulsory reference to the auditor with power to determine any of the issues. As for the source of the power exercised by Judge Hand, the Supreme Court found it in the inherent powers of courts to take action, not forbidden by statute or Constitution, that will aid them in the performance of their duties.

state on public duty, in 33 HARV. L. REV. 721, 734. See also Emil W. Colombo, "Service on Parties Fraudulently Brought Within the Jurisdiction", 3 BR. MONTH. L. REV. 23.

⁵² 253 U. S. 543, 40 Sup. Ct. 543 (1920). See Thomas W. Shelton, "A Useful Procedural Innovation—Auditors in Law Cases", 91 CENT. L. J. 59.

⁵³ *In re Peterson*, — U. S. —, 40 Sup. Ct. 178 (1920).

This inherent power was said to be the same whether the court sits in law or in equity. Owing to provisions in the federal statutes, a discretion reserved by the trial judge as to apportioning the costs of the enterprise was negatived and it was declared that the expense must be borne by the losing party. Mr. Justice Brandeis wrote the opinion of the court. Justices McKenna, Pitney and McReynolds dissented, without opinion.

Several cases involved questions of procedure in the state courts. *Chicago, R. I. & P. R. Co. v. Cole*⁵⁴ found it proper for a state to provide that the defenses of contributory negligence and assumption of risk shall in all cases be a question of fact for the jury, since those defenses might be abolished altogether. Mr. Justice Holmes declared that a state may do away with the jury altogether, or modify its constitution, the procedure before it, or the requirements of a verdict, "as it may confer legislative and judicial powers upon a commission not known to the common law." So, he continued, the state may confer upon a jury larger powers than those that generally prevail. The cases cited for a number of these propositions were civil actions, but Mr. Justice Holmes does not include this qualification in his recital. The actual decision is of course restricted to civil actions and is limited by the concluding statement that "in the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed." It seemed to be conceded that the plaintiff's intestate had been guilty of what was contributory negligence at common law.⁵⁵

Minor complaints met with short answers in two cases. In *Goldsmith v. Prendergast Construction Co.*⁵⁶ Mr. Justice Day declared brusquely: "We find no merit in the contention that a federal constitutional right was violated because of the refusal to transfer the cause from the division of the Supreme Court of Missouri which heard it to the court in banc." In *Lee v. Central of Georgia Ry.*

⁵⁴ 251 U. S. 54, 40 Sup. Ct. 68 (1919). See 90 CENT. L. J. 167 and 5 VA. L. REG. n. s. 799.

⁵⁵ The question whether the acquisition of the privilege of voting entitles women to sit on juries is considered in 90 CENT. L. J. 205 and 68 U. PA. L. REV. 398. In 68 U. PA. L. REV. 369 is a note on the right to trial by jury in will cases under the Pennsylvania constitution.

⁵⁶ 252 U. S. 12, 40 Sup. Ct. 273 (1920), 19 MICH. L. REV. 129.

*Co.*⁵⁷ a plaintiff suing in the state court under the federal Employers' Liability Law complained because the state practice did not allow him to sue the company and the negligent engineer jointly in a single count. Mr. Justice Brandeis told him that such questions are normally matters of pleading and practice relating solely to the form of remedy and therefore wholly questions of state law. Only when they become matters of substance which affect a federal right, as in the case of the burden of proof in actions under the Employers' Liability Law,⁵⁸ does the state decision become subject to federal review.

Such questions as that involved in the preceding case might appropriately be classified together under the head of substantive elements in rights of action, and dealt with under the police power rather than in the section on judicial procedure. Such a group of cases would embrace also *Canadian Northern Ry. Co. v. Eggen*,⁵⁹ which sustained a Minnesota statute providing that "when a cause of action has arisen outside of this state, and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of this state who has owned the cause of action ever since it accrued." A North Dakota citizen injured in Canada was barred from suing in Canada by the Canadian statute of limitations. He brought his action in Minnesota within the time available for a Minnesota citizen. He complained that the Minnesota statute which barred him but did not bar citizens of Minnesota violated the provision in the federal Constitution that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The Circuit Court of Appeals agreed with him. But the Supreme Court said that the provision does not guarantee citizens of other states absolute equality with citizens of the state whose action is questioned, and that the plaintiff had all that he deserved if he had as long to sue in Minnesota as in the country where he worked and got hurt. For a year he is on an equality with

⁵⁷ 252 U. S. 109, 40 Sup. Ct. 254 (1920).

⁵⁸ See *Central Vermont Railway Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865 (1915), and *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 38 Sup. Ct. 535 (1918).

⁵⁹ 252 U. S. 553, 40 Sup. Ct. 402 (1920).

citizens of Minnesota; if he does not avail himself of this equality when he has it, he cannot complain that it does not continue longer, when the restriction as to him is reasonable in itself. It may be observed that Mr. Justice Clarke adduces no reasons why a distinction should be made between citizens of Minnesota and those of her sister states, as the court has done in the other cases when a discrimination has been sanctioned. The case, therefore, seems to stand for a principle that if citizens of other states have treatment which is fair intrinsically, and if they are in no way prejudiced by what is allowed to citizens of the state whose favor they are seeking, they cannot complain that a state is kinder to its own citizens than to others.⁶⁰

4. *Faith and Credit to Proceedings of Sister States*

An important question was settled in *Kenny v. Supreme Lodge*,⁶¹ in which Illinois was told that it could not refuse to allow suit in its courts on a judgment obtained in a sister state, although the original cause of action could not have been sued on in Illinois. The Illinois statute provided that no action should be brought in that state for damages occasioned by death in another state in consequence of wrongful action. The Illinois court construed this to forbid suit in Illinois on an Alabama judgment for an Alabama death, and sustained the statute as constitutional. But the Supreme Court distinguished the earlier cases allowing a state to refuse suit on a foreign judgment obtained by one foreign corporation against another⁶² and on a judgment for a penalty for violation of the law of a sister state,⁶³ and held the case before it governed by an earlier decision that Mississippi was bound to recognize a Missouri judgment on a Mississippi transaction that was void by the law of Miss-

⁶⁰ On the power of a state to close its courts to actions for wrongful death in other jurisdictions, see 33 HARV. L. REV. 727; on closing the courts to suits between foreign corporations on a foreign cause of action, see 29 YALE L. J. 457.

⁶¹ 252 U. S. 411, 40 Sup. Ct. 371 (1920). See 29 YALE L. J. 812. For notes on the contrary decision of the state court, see 2 ILL. L. BULL. 361 and 28 YALE L. J. 264.

⁶² *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 24 Sup. Ct. 92 (1903).

⁶³ *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 8 Sup. Ct. 1370 (1888).

issippi.⁶⁴ Mr. Justice Holmes recognized that "there is truth in the proposition that the Constitution does not require the state to furnish a court," but he declared that "it also is true that there are limits to the power of exclusion and to the power to consider the nature of the cause of action before the foreign judgment based upon it is given effect," and that "it is plain that a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." An argument that suit was foreclosed in Illinois because Alabama provided that the action could be maintained in a court of competent jurisdiction within the state "and not elsewhere" was dealt with by saying that "when the cause of action is created the invalidity of attempts to limit the jurisdiction of other states to enforce it has been established by the decisions of this court," and further that "had these decisions been otherwise they would not have imported that a judgment rendered exactly as required by the Alabama statute was not to have the respect due to other judgments of a sister state."

A question of *res adjudicata* was decided in *Napa Valley Electric Co. v. California*,⁶⁵ but as the case involved the credit to be given to a state judgment in a federal court, it is not technically an application of the full-faith-and-credit clause. Yet the case is a precedent that would be followed when the second action is brought in the court of a sister state. Constitutional questions are frequently questions of common law which constitutional clauses make matters of adjudication in the Supreme Court. The Constitution brings the question before the Supreme Court, but does not direct how it shall be decided. The quarrel in the instant case was whether the refusal of the California Supreme Court to entertain an appeal from the state railroad commission or to order the record to be certified by the commission for review in the court was a final adjudication or merely a refusal to adjudicate. In holding it to be the former, Mr. Justice McKenna referred to the "common, and at times necessary, practice of courts to determine upon the face of a pleading what action should be taken upon it." It was for the state court to decide what was proper practice under the statute—whether it might act without having the record of the commission before it. The Cali-

⁶⁴ *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641 (1908).

⁶⁵ 251 U. S. 366, 40 Sup. Ct. 174 (1920).

fornia cases were thought to show that the state court regarded the refusal of applications for certiorari to review the orders of the commission as decisions that those orders are lawful. The refusal in question was therefore held to be an exercise of judicial power, and as the refusal was not appealed from, it was held a final judgment which precluded a reëxamination of the same issues in a subsequent proceeding.⁶⁶

IX. ADMINISTRATIVE POWER AND PROCEDURE

Underlying all questions as to the propriety or the effect of administrative action are the constitutional issues whether the delegation of power to the administrative officer is within the restrictions set by what is left of the principle of the separation of powers, whether the general regulations or the specific findings of the administration can be accepted as final, and whether the procedure indulged in by the administration is proper. These questions are frequently inter-related. The finality of administrative adjudications may depend upon whether they were reached by appropriate methods. The validity of the regulation or order may depend upon the scope of the power that may be delegated. The requisites of the procedure may vary with the effect to be ascribed to the action taken. Summary proceedings may be sanctioned where the action taken is necessarily

⁶⁶ As the Supreme Court's decision of constitutional issues involving questions of jurisdiction and of *res adjudicata* depends often upon its conception of the proper principles of conflict of laws, the following notes and articles may be of interest to students of constitutional law: on domicil, 20 COLUM. L. REV. 87, 33 HARV. L. REV. 863, 18 MICH. L. REV. 331, 332; on law governing question of capacity, 5 CORNELL L. Q. 312, 33 HARV. L. REV. 612, 726, and Ernest G. Lorenzen, "The Theory of Qualifications and the Conflict of Laws", 20 COLUM. L. REV. 247; on jurisdiction for divorce and effect of decree in other states, 20 COLUM. L. REV. 491, 617, 33 HARV. L. REV. 729, 4 MINN. L. REV. 456, 29 YALE L. J. 119; on foreign judgments, 33 HARV. L. REV. 984, 18 MICH. L. REV. 142, 4 MINN. L. REV. 546, Herbert F. Goodrich, "Enforcement of a Foreign Equitable Decree", 5 IOWA L. BULL. 230, and Ernest G. Lorenzen, "The Enforcement of American Judgments Abroad", 29 YALE L. J. 188, 268; on injunction to restrain foreign proceedings, 33 HARV. L. REV. 92; on service of process at request of a foreign court, 33 HARV. L. REV. 978; on construction or enforcement of foreign statutes, 29 YALE L. J. 230, 329, 798; on proof of foreign law, 33 HARV. L. REV. 315; on "renvoi", 29 YALE L. J. 214.

subject to judicial review, while more careful investigation is required for determinations that may be conclusive. Above all, the extent of possible delegation and the propriety of modes of action vary with the nature of the interests with which the administration is dealing. Wide delegation and drastic procedure may be proper when the administration is running public business or dispensing public bounty, but improper when it is directly interfering with individual liberty. Indeed, there are few, if any, general principles of administrative law under our Constitution. Instead we have one set of rules for police interferences and other sets of rules for administrative action in the exercise of the powers of taxation or of eminent domain, the conduct of public business or the bestowal of public privileges.⁶⁷

The cases involving administrative action in the fields of taxation and of eminent domain have already been reviewed. The wide scope allowed to administrative authorities in determining the area to be subjected to a special assessment is illustrated by *Branson v. Bush*⁶⁸ and *Goldsmith v. Prendergast Construction Co.*⁶⁹ The hearing afforded the taxpayer on the question of his proportion of benefit was held adequate in *Farncomb v. Denver*,⁷⁰ but found doubtful in *Oklahoma Ry. Co. v. Severns Paving Co.*⁷¹ Other questions as to the relief open to taxpayers against alleged unconstitutional levies

⁶⁷ See John A. Fairlie, "Administrative Legislation", 2 ILL. L. BULL. 373, and Frederick Green, "Separation of Governmental Powers", 2 ILL. L. BULL. 373, and 29 YALE L. J. 369. Questions of the delegation of power are considered in 15 ILL. L. REV. 108, 18 MICH. L. REV. 328, and 6 VA. L. REV. 441. Various phases of judicial control over administrative action are discussed in 20 COLUM. L. REV. 97, 33 HARV. L. REV. 462, 478, and 29 YALE L. J. 358, 361. Cases on the liability of officers are dealt with in 19 COLUM. L. REV. 418, 20 COLUM. L. REV. 94, 210, 227, and 29 YALE L. J. 361. On the power of equity over public elections, see 29 YALE L. J. 655; on eligibility of women for public office, 33 HARV. L. REV. 295; on effect of Nineteenth Amendment on exclusion of women from juries, 8 VA. L. REV. 589, on right of *de jure* officer to salary after payment to *de facto* officer, 18 MICH. L. REV. 434; on expiration of term of office, 29 YALE L. J. 118.

⁶⁸ 251 U. S. 182, 40 Sup. Ct. 113 (1919), 19 MICH. L. REV. 127.

⁶⁹ 252 U. S. 12, 40 Sup. Ct. 273 (1920), 19 MICH. L. REV. 129.

⁷⁰ 252 U. S. 7, 40 Sup. Ct. 271 (1920), 19 MICH. L. REV. 129.

⁷¹ 251 U. S. 104, 40 Sup. Ct. 73 (1919), 19 MICH. L. REV. 129.

are considered in *Wallace v. Hines*,⁷² *Shaffer v. Carter*,⁷³ *Ward v. Love County*,⁷⁴ and *Bradwell v. Carter County*,⁷⁵ though these cases relate only indirectly to administrative action. Administrative power and procedure in taking property by eminent domain is considered in *Hays v. Port of Seattle*⁷⁶ and *Bragg v. Weaver*,⁷⁷ which show that administrative officers may determine the necessity and expediency of the taking, that the taking may precede the determination of compensation where adequate provision is made for getting compensation later, and that the property owner is not entitled to a hearing before the administration on the question of compensation where the statute allows him to appeal from its award and get a judicial hearing of the question of what is due him.

Administrative exercise of the police power was involved in a number of the cases reviewed under that head, and under miscellaneous federal powers and the regulation of commerce. In *Pennsylvania R. Co. v. Pennsylvania*⁷⁸ it was declared that a state cannot give a public service commission power to do what the laws of the United States forbid, whether its action be called administrative or judicial. Several of the cases dealing with public utilities show that an administrative order is subject to all the judicial scrutiny that would be visited on a direct legislative prescription. The requirement that administrative action regulating rates must be so exercised as to afford to the victim a fair opportunity to contest the reasonableness of the rates before a judicial tribunal was passed upon in *St. Louis, I. M. & S. Ry. Co. v. Williams*,⁷⁹ *Ohio Valley Water Co. v. Ben Avon Borough*,⁸⁰ *Oklahoma Operating Co. v. Love*,⁸¹ and *Oklahoma Gin Co. v. Oklahoma*.⁸² The reasonableness of rates prescribed by a commission was reviewed in *Grosbeck v.*

⁷² 253 U. S. 66, 40 Sup. Ct. 435 (1920), 19 MICH. L. REV. 30, 121.

⁷³ 252 U. S. 37, 40 Sup. Ct. 221 (1920), 19 MICH. L. REV. 124.

⁷⁴ 253 U. S. 17, 40 Sup. Ct. 419 (1920), 19 MICH. L. REV. 133.

⁷⁵ 253 U. S. 25, 40 Sup. Ct. 422 (1920), 19 MICH. L. REV. 133.

⁷⁶ 251 U. S. 233, 40 Sup. Ct. 125 (1920), 19 MICH. L. REV. 149.

⁷⁷ 251 U. S. 57, 40 Sup. Ct. 63 (1919), 19 MICH. L. REV. 149.

⁷⁸ 250 U. S. 566, 40 Sup. Ct. 36 (1919), 19 MICH. L. REV. 27.

⁷⁹ 251 U. S. 63, 40 Sup. Ct. 71 (1919), 19 MICH. L. REV. 141.

⁸⁰ 253 U. S. 287, 40 Sup. Ct. 527 (1920), 19 MICH. L. REV. 142.

⁸¹ 252 U. S. 331, 40 Sup. Ct. 338 (1920), 19 MICH. L. REV. 143.

⁸² 252 U. S. 339, 40 Sup. Ct. 341 (1920), 19 MICH. L. REV. 143.

*Duluth, S. S. & A. Ry. Co.*⁸³ An industrial commission's award of damages for permanent facial disfigurement was sustained in *New York Central Ry. Co. v. Bianc.*⁸⁴ The jurisdiction and procedure of the Federal Trade Commission was considered in *Federal Trade Commission v. Gratz.*⁸⁵ The internal law of administration was involved in *Burnap v. United States*,⁸⁶ which dealt with the removal of federal officers. In *Houston v. Ormes*⁸⁷ a suit against the Secretary of the Treasury was held not to be a suit against the United States.⁸⁸

While the federal government has no police power as such, it often uses its recognized powers for police purposes. Indeed, the term federal police power has now won recognition even from the Supreme Court. Several administrative exercises of this so-called federal police power were questioned in cases decided during the past term. In *United States v. Standard Brewery*,⁸⁹ which held that the War Prohibition Act of 1918 applied only to intoxicating liquors, it was laid down that contrary rulings of the internal revenue department could not alter the terms of the statute and make conduct criminal which the statute does not. In *Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co.*⁹⁰ it was declared that the question whether a stipulation in an interstate bill of lading violates the federal statute against limiting liability for loss is a question of law

⁸³ 250 U. S. 607, 40 Sup. Ct. 38 (1919), 19 MICH. L. REV. 140.

⁸⁴ 250 U. S. 596, 40 Sup. Ct. 45 (1919), 19 MICH. L. REV. 145.

⁸⁵ 253 U. S. 421, 40 Sup. Ct. 572 (1920), 19 MICH. L. REV. 23, note 39.

⁸⁶ 252 U. S. 512, 40 Sup. Ct. 374 (1920), 19 MICH. L. REV. 18.

⁸⁷ 252 U. S. 469, 40 Sup. Ct. 369 (1920), *supra*, p. 302.

⁸⁸ For a note on *Ball Engineering Co. v. J. G. White Co.*, 250 U. S. 45, 39 Sup. Ct. 393 (1919), on the subject of suits against the United States under the Tucker Act, see 29 YALE L. J. 125. For other discussions of the liability of a government for the acts of its officers, see 19 COLUM. L. REV. 407, 5 CORNELL L. Q. 78, 338, 33 HARV. L. REV. 713, 735, 18 MICH. L. REV. 433, and George DeForest Lord, "Admiralty Claims Against the Government", 19 COLUM. L. REV. 465. For comment on the tort liability of municipal corporations see 20 COLUM. L. REV. 619, 620, 5 CORNELL L. Q. 90, 18 MICH. L. REV. 708, 29 YALE L. J. 117, 911. The contractual powers and liabilities of municipal corporations are treated in 20 COLUM. L. REV. 336, 349, and 29 YALE L. J. 364. On another phase of the law of municipal corporations, see Richard W. Montague, "Law of Municipal Home Rule in Oregon", 8 CALIF. L. REV. 151.

⁸⁹ 251 U. S. 210, 40 Sup. Ct. 139 (1920).

⁹⁰ 253 U. S. 97, 40 Sup. Ct. 504 (1920).

which the courts must decide for themselves, regardless of any determination by the Interstate Commerce Commission that the stipulation in question is reasonable.

The effect to be given to a reparation order of the Interstate Commerce Commission was considered in *Spiller v. Atchison, T. & S. F. R. Co.*⁹¹ The statute provided that the order of the commission that reparation is due the shipper should be *prima facie* evidence in actions brought by him against the carrier in courts. The carrier based his objections to such weight being accorded to the commission's findings on the ground that its procedure was unduly lax. Its reception of hearsay evidence was overlooked, not on the ground that it was entitled to accept such evidence, but for the reason that the carrier had failed to object to its reception on the ground of hearsay during the hearing before the commissioner. Yet the opinion hints that the commission has wide latitude in the matter of evidence, especially when its findings are made only *prima facie* evidence. It was explicitly declared that where the essential facts found by the commission are based on substantial evidence, and there has been no denial of the right to a fair hearing, its findings and order will not be rejected because improper evidence was admitted or the best possible available evidence was not produced or because a different conclusion might have been reached.

Two more important cases protected Chinamen from deportation orders of immigration officials. Both involved Chinamen who had previously been in the United States and were returning to the United States after a temporary visit to China. *White v. Ching Fong*⁹² involved an alien who was conceded by the administrative authorities to have been previously in this country, but who was ordered deported on the strength of an administrative finding that his original entry was unlawful. A writ of habeas corpus was awarded on the ground that under the statute a Chinese person already in the United States is entitled to a judicial determination of his right to remain and that this right is not lost by a temporary visit to China. His situation upon his return is not that of one first seeking to enter.

⁹¹ 253 U. S. 117, 40 Sup. Ct. 466 (1920).

⁹² 253 U. S. 90, 40 Sup. Ct. 449 (1920).

*Kwock Jan Fat v. White*⁹³ had to do with a claim to citizenship. Here the petitioner while in this country and intending to visit China filed an application as provided by law for a "preinvestigation of his claimed status as an American citizen." The investigation resulted in an official determination that he was an American citizen. During his absence in China anonymous communications to the commissioner of immigration started a new investigation, and upon his return he was denied entry. Objections to the hearing accorded on this occasion included the facts that the examining inspector submitted to the commissioner as evidence statements reported to be made by unnamed persons, that a demand by the petitioner for the names was refused, and that the examining inspector failed to record in the testimony taken the fact that the three white persons of reputable character who testified to the petitioner's American citizenship were confronted with him and recognized him as the boy they had known in his youth. These allegations were admitted by demurrer. While the court indicated disapproval of the reception in evidence of unsworn statements by unnamed persons, it stated that in view of the declaration by the commissioner that this report did not influence his decision, it might not say that this "rendered the hearing so manifestly unfair as to require reversal, if there were nothing else objectionable in the record." But the failure to record the fact that there was mutual recognition between the petitioner and the three white witnesses was held enough to entitle the petitioner to a writ of habeas corpus. While the decision goes on the ground that the hearing did not fulfil the requirements of the statute, it is likely that the court would hold, if necessary, that a fair hearing on the question of citizenship is essential to due process of law. Having found the administrative hearing unfair, the Supreme Court ordered the district court to hear and determine the question of citizenship on its merits, after the practice approved in an earlier case.⁹⁴ It would seem that under the *Chin Fong* case, just considered, the petitioner was also entitled to a judicial hearing

⁹³ 253 U. S. 454, 40 Sup. Ct. 566 (1920).

⁹⁴ *Chin How v. United States*, 208 U. S. 8, 28 Sup. Ct. 201 (1908). For a discussion of this procedure see "Judicial Review of Administrative Action in Immigration Proceedings", 32 HARV. L. REV. 360.

because he had concededly been a long-time resident prior to his recent visit to China.

Plainly greater latitude is allowed administrative officers in action which decides only whether individuals are entitled to the benefits conferred by statutes. Thus, in *United States v. Lane*⁹⁵ the court accepted without question the finding of the land department that work done by a prospector was not enough to entitle him to privileges open to those who have "opened or improved" a coal mine. Mr. Justice McKenna said that, where there is discretion, the finding of the land department, though disputable, is impregnable to mandamus. So, in *Cameron v. United States*⁹⁶ it was held that the findings of the Secretary of the Interior that a tract covered by a mineral location is not mineral land, and that there had been no sufficient discovery, are conclusive, in the absence of fraud or imposition. *United States v. Poland*⁹⁷ held that where a land patent was issued by land officers in violation of the statute the government is entitled to have it canceled unless a successor of the patentee is a *bona fide* purchaser. A patent was also canceled in *United States v. Southern Pacific Co.*⁹⁸ In this same group may be put *National Lead Co. v. United States*,⁹⁹ which accepted the interpretation of the Treasury Department that the drawback allowed on exportation of products from raw materials previously imported should, when more than one product is derived from those materials, be apportioned according to the relative value of the respective products and not according to their relative weight. This was an instance where the administration had to fill in a gap in the statute. Though in the particular case the court plainly thought the administrative ruling right in itself, it often shows an inclination not to substitute its opinion for that of the administration, particularly when the complainant is in the position of looking a gift horse in the mouth.

Several cases involved administrative determinations in the course of carrying on government business. *Grand Trunk Western Ry.*

⁹⁵ 250 U. S. 549, 40 Sup. Ct. 33 (1919).

⁹⁶ 252 U. S. 450, 40 Sup. Ct. 410 (1920).

⁹⁷ 251 U. S. 221, 40 Sup. Ct. 127 (1920).

⁹⁸ 251 U. S. 1, 40 Sup. Ct. 47 (1919). See 20 COLUM. L. REV. 228.

⁹⁹ 252 U. S. 140, 40 Sup. Ct. 237 (1920).

*Co. v. United States*¹⁰⁰ refused to give weight to a long-continued administrative construction that a certain statute relating to over-payments for carrying the mails does not apply to a certain railroad, where this construction was due to a mistake of fact as to whether the road in question was in the class of the land-aided roads. In *Kansas City So. Ry. Co. v. United States*¹⁰¹ it was held that the failure of the Postmaster General to fine companies for less than twenty-four hours' delay in delivery of the mails is not to be taken as an administrative construction that the statute empowered him to impose fines only when the delay exceeds twenty-four hours. *New York, N. H. & H. R. Co. v. United States*¹⁰² accepted the administrative practice of weighing the mails only once in four years, as warranted by the letter of the statute. *The Mail Divisor Cases*¹⁰³ held railroads bound by the average weight of mails determined by the administration. Only four of the judges thought that the method employed was warranted by the statute, but two others held the statute directory only and not mandatory, and thought that, since the Postmaster General had discretion as to the rate of pay and as the companies had carried the mails on his terms when they were not by law obliged to, they were bound by the conditions under which they undertook the service. In *Eastern Extension, Australasia & China Tel. Co. v. United States*¹⁰⁴ and *E. W. Bliss Co. v. United States*¹⁰⁵ the court had to consider whether the action of administrative officers had been such as to create a claim against the government on which it would be subject to suit in the court of claims.¹⁰⁶

Two cases involved administrative dealings with the Indian tribes. *United States v. Omaha Tribe of Indians*¹⁰⁷ denied recovery against

¹⁰⁰ 252 U. S. 112, 40 Sup. Ct. 309 (1920).

¹⁰¹ 252 U. S. 147, 40 Sup. Ct. 257 (1920).

¹⁰² 251 U. S. 123, 40 Sup. Ct. 67 (1919). Mr. Justice Brandeis dissents. See 29 YALE L. J. 666.

¹⁰³ 251 U. S. 326, 40 Sup. Ct. 162 (1920). Justices Day and Van Devanter dissent. Mr. Justice McReynolds did not sit.

¹⁰⁴ 251 U. S. 355, 40 Sup. Ct. 168 (1920).

¹⁰⁵ 253 U. S. 187, 40 Sup. Ct. 455 (1920).

¹⁰⁶ For references to discussions of claims against governments see note 88, *supra*.

¹⁰⁷ 253 U. S. 275, 40 Sup. Ct. 522 (1920).

the United States for depredations committed by a hostile tribe, and held that the agreement in a treaty to give protection so long as the President may deem it necessary imposed no liability in the absence of a finding that there was failure to provide such protection as the President deemed necessary. The case illustrates the principle that a right dependent upon administrative action cannot arise unless the requisite action is taken. *United States v. Payne*¹⁰⁸ held that the Secretary of the Interior is the final judge of whether names shall be enrolled as members of the Creek Nation and that until he has taken final action he may abandon his preliminary conclusions. The Secretary had written the commissioner approving his report, but he was allowed to rescind this without giving any hearing or adducing any reasons. Such action prior to any actual enrollment was held not to deny due process of law.

Two other cases accepted long-continued administrative constructions of statutes. *Ash Sheep Co. v. United States*¹⁰⁹ adopted the administrative conclusion that "cattle" includes sheep, in view of warrant in the dictionaries aided by the presumption that Congress would have amended the statute had it disliked the administrative interpretation of its scope. In *Corsicana National Bank v. Johnson*¹¹⁰ Mr. Justice Pitney declared:

"Whatever view we might entertain, were the matter *res nova*, we are advised that by the practice and administrative rulings of the Comptroller of the Currency during a long period, if not from the beginning of national banking, liabilities which are incurred by one person avowedly and in fact as surety or as indorser for money borrowed by another are not included in the computation. We feel constrained to accept this as a practical construction of the section. * * *"

The question arose in a suit by a national bank against one of its officers for loaning amounts in excess of that permitted by the statute to a single borrower.

¹⁰⁸ 253 U. S. 209, 40 Sup. Ct. 513 (1920).

¹⁰⁹ 252 U. S. 159, 40 Sup. Ct. 241 (1920).

¹¹⁰ 251 U. S. 68, 40 Sup. Ct. 82 (1919).

X. INTERGOVERNMENTAL RELATIONS

Several of the cases already reviewed involve relations between the states and the United States. In *Hawke v. Smith*¹¹¹ and *National Prohibition Cases*¹¹² it was settled that a state legislature acts as a federal agency in passing upon proposed amendments to the federal Constitution, and that therefore a state cannot subject the action of the legislature to a referendum. *Evans v. National Bank of Savannah*¹¹³ illustrates the familiar rule that national banks are subject to state control only to the extent permitted by Congress. *Ervien v. United States*¹¹⁴ shows that a stipulation in an enabling act as to the use to be made of lands therein granted to the thereby newly-created state is binding on the state after it attains a full-fledged status and will be enforced by the federal courts. *United States v. Osage County*¹¹⁵ lets the United States as guardian of Indians sue in a federal court to protect its wards from wrongful state taxation. *Duhne v. New Jersey*¹¹⁶ holds that the original jurisdiction of the Supreme Court in controversies to which a state is a party is confined to cases in which the federal judicial power extends to suits against a state, and therefore does not include a suit sought to be brought against a state by one of its citizens.¹¹⁷

Relations between states brought several cases to the Supreme Court. Questions of fact with regard to boundaries were adjudicated in *Minnesota v. Wisconsin*¹¹⁸ and *Arkansas v. Mississippi*.¹¹⁹ In *Ohio v. West Virginia*¹²⁰ and *Pennsylvania v. West Virginia*¹²¹

¹¹¹ 253 U. S. 221, 40 Sup. Ct. 495 (1920), 19 MICH. L. REV. 2.

¹¹² 253 U. S. 350, 40 Sup. Ct. 486 (1920), 19 MICH. L. REV. 4.

¹¹³ 251 U. S. 108, 40 Sup. Ct. 58 (1919), 19 MICH. L. REV. 18.

¹¹⁴ 251 U. S. 41, 40 Sup. Ct. 75 (1919), 19 MICH. L. REV. 16.

¹¹⁵ 251 U. S. 128, 40 Sup. Ct. 100 (1919), 19 MICH. L. REV. 17.

¹¹⁶ 251 U. S. 311, 40 Sup. Ct. 154 (1920), *supra*, p. 301.

¹¹⁷ A question of intergovernmental relations is considered in M. G. Wallace, "Taxation by the States of United States Bonds Held by Corporations", 6 VA. L. REV. 20.

¹¹⁸ 252 U. S. 273, 40 Sup. Ct. 314 (1920).

¹¹⁹ 252 U. S. 344, 40 Sup. Ct. 333 (1920).

On such questions of fact as those involved in this and in the preceding case, see Harvey Hoshour, "Boundary Controversies Between States Bordering on a Navigable River", 4 MINN. L. REV. 463.

¹²⁰ 252 U. S. 563, 40 Sup. Ct. 357 (1920).

¹²¹ 252 U. S. 563, 40 Sup. Ct. 357 (1920).

the court granted motions to consolidate the cases for the purpose of taking testimony, and appointed a commissioner for that purpose. Four cases each styled *Oklahoma v. Texas*¹²² dealt with petitions to intervene or granted leave to file them. One issued an order granting an injunction and appointing a receiver, and another issued an order instructing the receiver.

Columbia University.

THOMAS REED POWELL.

¹²² 252 U. S. 372, 40 Sup. Ct. 353 (1920) ; 253 U. S. 465, 40 Sup. Ct. 580, 580, 582 (1920).

LIBRARY OF CONGRESS



0 012 054 412 3

